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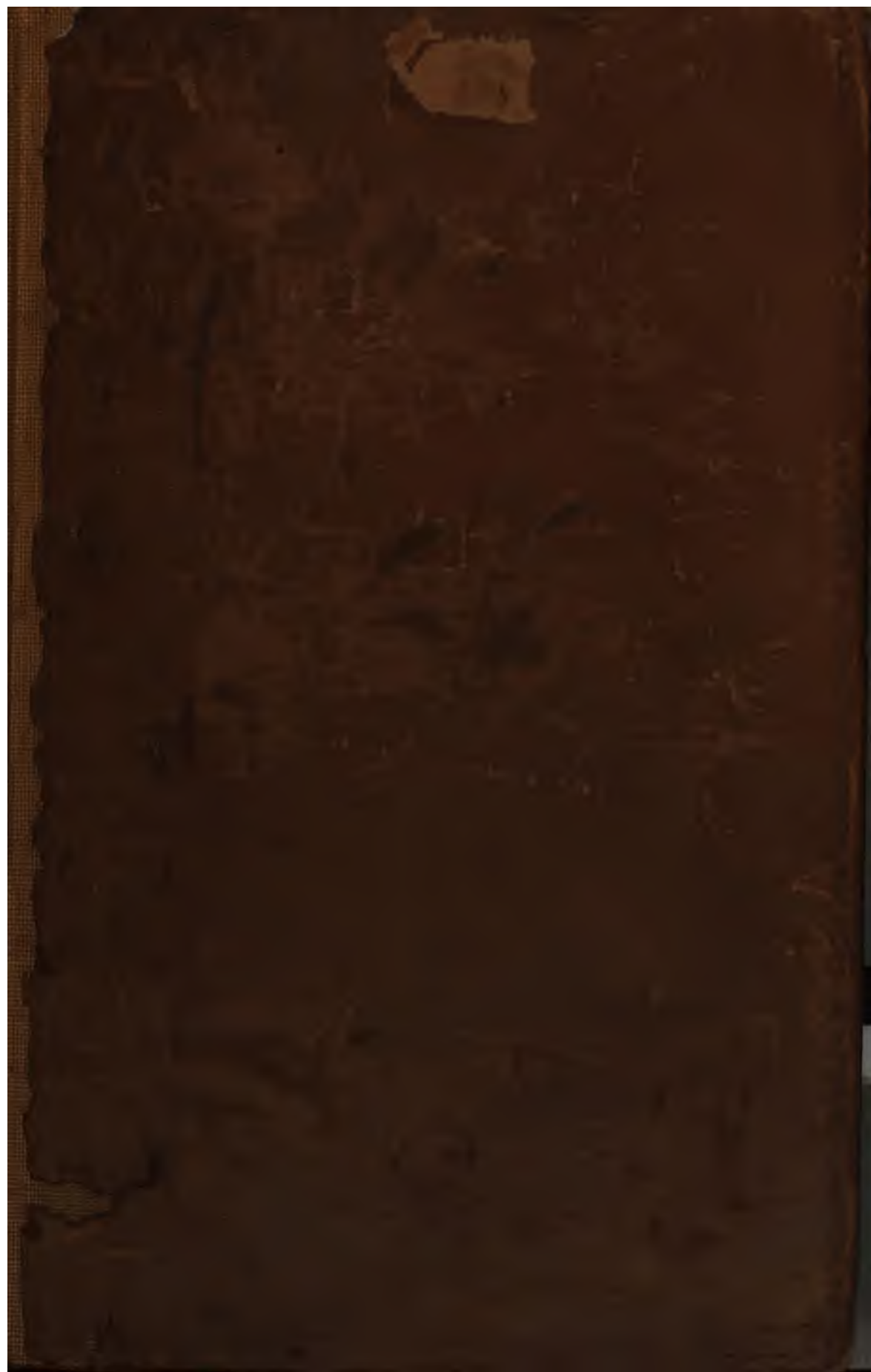
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**REPORTS OF CASES**  
ARGUED AND DETERMINED  
IN  
**The Court of King's Bench,**

DURING  
MICHAELMAS TERM, NINTH GEO. IV.

---

BY  
JAMES MANNING, Esq. OF LINCOLN'S INN,  
AND  
ARCHER RYLAND, Esq. OF GRAY'S INN,  
BARRISTERS AT LAW.

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VOL. III.

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WITH AN INDEX,  
AND  
*TABLE OF PRINCIPAL MATTERS.*

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**J U D G E S**  
OF THE  
**C O U R T O F K I N G ' S B E N C H,**  
*During the period comprised in this volume.*

---

CHARLES LORD TENTERDEN, C. J.  
Sir JOHN BAYLEY, Knt.  
Sir GEORGE SOWLEY HOLROYD, Knt.  
Sir JOSEPH LITTLEDALE, Knt.  
Sir JAMES PARKE, Knt.

---

ATTORNEY-GENERAL.  
Sir CHARLES WETHERELL, Knt.

SOLICITOR-GENERAL.  
Sir NICHOLAS CONYNGHAM TINDAL, Knt.

---

**MEMORANDA.**

Early in this term, *Mr. Justice Holroyd* resigned his seat in this Court, which he had occupied more than twelve years, and was succeeded by *James Parke*, of the Inner Temple, Esq. who was called to the degree of the coif, and gave rings with the motto, "*Justitiæ tenax.*" *Mr. Justice James Parke* took his seat in this Court on Tuesday, the 18th day of November, and was afterwards knighted.

*Thomas Denman*, Esq. having received a patent of precedence, took his seat within the bar.



A

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# CASES

ARGUED AND DETERMINED

IN THE

*COURT OF KING'S BENCH,*

IN

MICHAELMAS TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

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## MEMORANDA.

IN the early part of this Term, Mr. Justice *Holroyd* resigned his seat in this Court, and was succeeded by *James Parke*, of the Inner Temple, Esq., who was called to the degree of Serjeant at Law, and gave rings, with the motto, "*Justitiæ tenax*." He took his seat in this Court on Tuesday, the 18th day of November, and afterwards received the honour of Knighthood.

*Thomas Denman*, of Lincoln's Inn, Esq., Common Serjeant of the City of London, took his seat within the Bar, having received a Patent of Precedence.

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CAVE, Esq. v. COLEMAN.

Declaration, averring the consideration for the purchase of a horse to be "that the buyer should give a large price, to wit, 100 guineas."

Proof, that the buyer was to give "100 guineas, and 10*l.* more, if the horse suited him:"—Held, no variance.

A verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it the horse is perfectly quiet and free from vice," is a warranty.

**ASSUMPSIT** on the warranty of a horse. The declaration stated, that in consideration that plaintiff would purchase of defendant a certain horse, *at a large price, to wit, the sum of 105*l.**, defendant *undertook that the horse was perfectly quiet and free from vice*. Plea, non assumpsit; and issue thereon. At the trial before *Garrow, B.*, at the last Herts Assizes (*a*), it appeared in evidence that the plaintiff had agreed to give 100 guineas for the horse, "and 10*l.* more, if the horse suited him;" and that the defendant, in the course of conversation at the dealing for the horse, had said, "you may depend upon it that the horse is perfectly quiet, and free from vice;" and that the bargain was afterwards struck, without any further warranty being given, either by parol or in writing. It was contended, on the part of the defendant, first, that there was a fatal variance between the consideration stated in the declaration and that given in evidence; and, secondly, that no warranty had been proved to support the averment of warranty in the declaration; and, therefore, that the plaintiff ought to be nonsuited. The learned Judge refused to nonsuit, but reserved the points; and some evidence having been given that the horse was unquiet, the case went to the jury, who found a verdict for the plaintiff, the defendant having liberty to move to enter a nonsuit.

*Brodrick* now moved accordingly, and renewed both objections. First, the consideration is not correctly stated on the record. The whole consideration ought to be set out; here an important part is omitted. The declaration describes the consideration as, *a large price, to wit, the sum of 105*l.**; the evidence proved that it was 100 guineas, and 10*l.* more, if the horse suited. [*Bayley, J.* Either way,

(*a*) Counsel for the plaintiff, *Spunkie*, Serjt. and *Adolphus*, for the defendant, *Brodrick* and *Ryland*.

it was "a large price," and that is the important part; the words laid under the *videlicet* may be rejected, and then there is no variance.] Those words shew that the price was conditional, its amount depending upon a contingency; they form an important part of the consideration, therefore, and cannot be rejected. *Blyth v. Bampton* (a) is expressly in point. There, the plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back, if the horse did not bring the plaintiff 4*l.* or 5*l.* The averment in the declaration was, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound. And that was held a fatal variance (b). Secondly, there was no evidence of any warranty sufficient to support the declaration in that respect. To support an action upon a supposed contract like this, there must be proof of an express warranty. Here, there was nothing more than a mere representation in the course of the dealing, couched in phrases such as are always used by a seller towards a purchaser in the ordinary course. [*Bayley, J.* But that representation was that the horse was quiet, and free from vice, and being made in the course of dealing, and before the bargain was complete, it amounted to a warranty.]

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Lord TENTERDEN, C. J.—I think no rule ought to be granted in this case. Upon the first point, I think there was no variance between the description of the contract given in the declaration, and that proved in evidence. The substance of both was this:—If the horse suits the buyer, he is to give the seller 10*l.* above the hundred guineas; but if the buyer had kept the horse, I do not see how the seller

(a) 3 Bingh. 472.

(b) *Gaselee, J.*, dissented from the decision, being of opinion, as suggested in the principal case by *Bayley, J.*, that the words laid under the *videlicet* were immate-

rial, and might be rejected as surplusage. And see *Durston v. Tut-  
han*, 3 T. R. 67, n., where it was held, that such a variance was fatal, because the sum was not laid under a *videlicet*.



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could have maintained any action to recover the 10*l.* The buyer might have said, "the horse does not suit me, but I chuse to keep him nevertheless." With respect to the other point, I think it clear that the proof of warranty was sufficient to support the declaration. The parties are dealing, and the seller says, "you may depend upon it that the horse is perfectly quiet, and free from vice." That is a very sufficient warranty, though the word *warrant* was not used.

The other Judges concurred.

Rule refused.

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BEST v. SAUNDERS.

Primage belongs of right to the master of a ship, and nothing but an express agreement can divest him of his right to recover it from the freighter.

An agreement by the master to receive from the owner a fixed sum "in full for all cabin and other allowances," does not divest the master of his right to primage.

By bill of lading freight was to be paid "as per charter-party, with primage and average accustomed:"—Held, that the reference to the charter-party applied to the freight only, and that, in an action for primage, the charter-party need not be produced.

**ASSUMPSIT**, by the captain of a ship against the freighter, for *primage*. Plea, *non assumpsit*; and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London Adjourned Sittings after last term, the case was this:—The plaintiff had agreed with the owner of the ship *Albion* to take the command of her on a voyage from London to New South Wales, and back, by way of India. The plaintiff was to receive 10*l.* per month for wages, and 150*l.* "*in full for all cabin and other allowances.*" The plaintiff took the command of the *Albion*, and performed the voyage. An agreement was afterwards made between the owner of the *Albion* and the defendant for the freight of certain sugars, the terms of which appeared in the following letter, written by the defendant to his correspondent at the Mauritius:—

"London, June 5, 1823. I have this day engaged the ship *Albion*, commanded by Captain *Best*, and calculated to carry about 600 tons of sugar, to proceed direct from New South Wales to the Isle of France, there to receive

from you a cargo of as much of that article as she can carry, at a freight of 5*l.* per ton, stipulated freight, for what she can bring to the port of London."

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The defendant's correspondent at the Mauritius accordingly shipped on board the *Albion* a cargo of sugar, and the plaintiff signed bills of lading, the terms of which were, that the cargo was to be delivered to *Saunders*, or his assigns, paying freight, *as per charter-party*, with *primage* and average accustomed. The cargo was delivered to the defendant. The accustomed *primage* on the freight was 5*l.* per cent., amounting to 140*l.* The charter-party was not produced. Upon these facts it was contended, on the part of the defendant, that the action was not maintainable, upon four several grounds. First, that the plaintiff having, by his agreement with his owner, accepted a specific sum in lieu of *all cabin and other allowances*, had waived his claim to *primage*. Secondly, that the plaintiff was bound by the contract made between his owner and the defendant, which (independently of the bill of lading) was for a specific rate of freight, without mentioning *primage*. Thirdly, that there was no privity of contract between the plaintiff and the defendant, the agreement respecting the freight being made between the defendant and the owner. And, fourthly, that even if the defendant was bound by the bill of lading, still as that instrument referred to another, namely, the charter-party, as containing the particulars of the contract, the latter was the best evidence of the terms of the contract, and the plaintiff was bound to produce it. Lord *Tenterden* overruled all these objections. His Lordship expressed his opinion, first, that the words "other allowances" in the agreement between the plaintiff and his owner, must be construed with reference to the word "cabin," and as meaning allowances of that nature; and that although the agreement did not mention *primage*, it contained nothing indicating an intention to exclude it.

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Secondly, that the agreement between the owner and the defendant did not contain any terms excluding primage. Thirdly, that the defendant's acceptance of the cargo under the bill of lading, signed by the plaintiff, created a privity of contract between them; the general rule of law being, that he who accepts goods under a bill of lading, thereby adopts the terms of the bill of lading. And, fourthly, that although the bill of lading referred to the charter-party, that was with reference to the freight only; and that the words "with primage and average accustomed," clearly meant the customary primage independent of the charter-party, and did not make it necessary to give the charter-party in evidence. The plaintiff, therefore, had a verdict, with liberty for the defendant, upon all or any of the above grounds, to move to enter a nonsuit.

Sir *J. Scarlett* now moved accordingly, renewing all the objections, and urging, that if the bill of lading gave a right of action to the plaintiff, it would follow that the same contract would give separate causes of action to two several individuals, inasmuch as the owner might then sue the defendant for the freight, and the captain might sue him for the primage. Upon this principle, as well as upon the grounds stated at the trial, he contended that the action could not be supported.

LORD TENTERDEN, C. J.—Generally speaking, and unless there be a special agreement to the contrary, the master of a trading vessel is entitled as a matter of course to what is called primage. Primage, from its very nature, seems to be the right of the master. It is an allowance made to him as an additional inducement to take care of the cargo during the voyage. It is sometimes called the master's hat-money, and was, I believe, originally so called, because the master went round with his hat in his hand, to receive whatever sum the owners of the goods on board, or their agents,

might think proper to give him (a). Formerly, therefore, it was merely a gratuity, and consequently uncertain in its amount; but it has by long usage grown into a right; and there are generally some means now of ascertaining its amount. The primage then being *primâ facie* the master's right, has there been any thing done in the present case to divest him of that right? I think not. There may, undoubtedly, be different modes of stipulating for the payment of primage. It may be applied for the benefit of the owner, and not for the benefit of the master; but that can only be done by a special agreement to that effect between the parties. It is said that in this case there was a written contract between the master and the owner, by which the former relinquished his claim for primage; but, in my opinion, that contract had no such effect, because it appears to me to have had no reference to that particular subject-matter. Then with respect to the charter-party, if the defendant relied upon that as containing any special agreement respecting the primage, it was for him to produce it in support of his case. As between the freighter and the master, the bill of lading, after specifying the sum to be paid with a reference to some charter-party, adds, "with primage and average accustomed," thereby expressly recognizing the general claim of the master for primage. It is said, that if the master has a right to sue the freighter upon the bill of lading for the primage, the owner will also have a right to sue him for the freight, and thus the same party will be liable to two separate actions at the suit of two separate individuals, upon one and the same contract.

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(a) "The word *primage* denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and to

be variously regulated in different voyages and trades. In the *Guidon* it is called "la contribution des chausses ou pot de vin du maitre." It is sometimes called "the master's hat money."—*Abbott on Shipping*, 282, 4th ed.; 5th ed. 272.

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That may be so, but I do not see any legal objection to it. Two parties may have separate rights as against a third person, arising out of the same contract; and where they have, it is in effect a separate contract enuring to the benefit of each, and each may enforce his own right under it. Such a consequence may be inconvenient, but it is not contrary to law. Upon the whole, I am of opinion that there is no ground for disturbing this verdict.

BAYLEY, J.—I am of the same opinion. The ordinary situation of the parties in such cases is, that the owner is entitled to maintain an action for the freight, and the master is entitled to maintain an action for the primage; nor is there any thing in that which militates against the policy of the law. By the ancient and uniform usage the owner is entitled to the freight, and the master to the primage; and each has a lien upon the cargo in respect of his own claim. There is an implied contract, recognized by the law, on the part of the freighter to pay primage; and in this case it is expressly stipulated by the bill of lading that he shall pay it. The charter-party, might, indeed, contain terms depriving the master of his right to primage; but that was not produced: and as the bill of lading *primâ facie* raised the inference that the primage was to be paid to the master in the ordinary way, it lay upon the defendant to rebut that inference by the production of the charter-party. In this case there was no evidence of any agreement between the parties depriving the master of his claim for primage, therefore his *primâ facie* right remained untouched, and he is entitled to maintain this action.

LITLEDALE, J.—Considering the nature and origin of the allowance called primage, it is clearly payable as matter of right to the master, and not to the owner. It may, I think, be doubted, whether if a contract were made between the owner and the freighter for a specific sum in

lieu of *all* charges, the master would be entitled to enforce his claim for the primage against the freighter. But in this case there is no such contract; and, on the contrary, the agent of the freighter has expressly stipulated to pay the accustomed primage, and the freighter himself has received the goods under that stipulation. As to the argument that two actions may be brought upon the same instrument, I own I can see no objection to it either in law or practice. It may be inconvenient to the defendant, but that is a matter for the consideration of all parties when they make their agreement, and cannot have any bearing upon the question as to their respective rights and liabilities.

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Rule refused.

ALLAN and another, Assignees of SCOTT, a bankrupt, v.  
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**ASSUMPSIT**, on a policy of insurance effected by the bankrupt on the ship *Benson*, valued at 2000*l.*, for twelve months; with an averment of a total loss by perils of the sea. The defendant paid money into Court to cover an average loss, and pleaded non assumpsit. At the trial before *Bayley J.*, at the last assizes for Newcastle-upon-Tyne, the case was this. The ship went aground at the entrance of the old harbour at Hull. The expense of repairing her would have amounted to 1450*l.*, and when repaired, she would not have been worth that sum. It was contended on the part of the defendant, that the plaintiffs could not recover for a total loss, because, if they did, they would receive more than the amount necessary to repair the ship; and that as that amount had been paid into Court, they ought to be nonsuited. The learned Judge declined to nonsuit, but reserved the point, leaving it to the jury to say whether the ship was worth repairing; and they finding

A ship insured in a valued policy for 2000*l.*, was damaged by perils of the sea. She might have been repaired for 1450*l.*, but she was not worth repairing:—Held, a total loss.

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that she was not, a verdict was taken for the plaintiffs for a total loss, with leave for the defendant to move to enter a nonsuit.

*F. Pollock* now moved accordingly. The assured are entitled to an indemnity from loss, but they have no right to convert a loss into a profit. The underwriters may either pay them the sum necessary for the repairs, or perform the repairs themselves; and the assured cannot be allowed to insist that what is really only a partial loss is constructively a total loss, and so compel the underwriters to pay the agreed value in the policy. The underwriters are bound by the agreed value in ascertaining the amount of a total loss; and the assured ought to be equally bound by it in ascertaining the amount of a partial loss. [Lord *Tenterden*, C.J. How can there be a different rule in ascertaining whether a loss is partial or total in an open policy and a valued policy?] Rightly considered, the rule is in reality the same; the argument is, that a constructive total loss is not to be treated as an actual total loss. Here the ship existed in specie; she might have been repaired; and when repaired she would have been worth as much or more than she was worth before the accident. In such a case, where the loss is in fact not total, it is surely sufficient to put the assured in as good a situation as he would have been in if the loss had never happened. A constructive total loss, in a case like this, can only mean that the ship is not worth repairing. But a constructive total loss may arise by other means; as by charges being incurred upon the ship exceeding her actual value. Suppose a case of salvage, where the ship not only continues to exist in specie, but is wholly uninjured; could the assured say, "this a constructive total loss; if I was not insured, I would not pay the salvage, and therefore I call upon you for a total loss." Or, might not the underwriter rather say, "I will pay you the salvage, and restore the ship to you uninjured, and you can require no more." Great inconsistency would follow from allowing the assured so to

estimate the loss upon a valued policy. If there was a surplus, however small, after repairing the ship, the loss would be deemed a partial loss only, and the assured would be entitled to the amount of the repairs only; but if the repairs exceeded the value, by however small an amount, the loss would be deemed a total loss, and the assured would be entitled to the agreed value: so that a difference of 5*l.* in the damage, might make a difference of several hundred pounds in the loss. In the present case, for instance, if the repairs had amounted to only 1400*l.*, the assured could have claimed that sum only, from which the underwriters might have deducted one third, new work for old. But the repairs amounting to 1450*l.*, the ship is not worth repairing, and the underwriters are required to pay 2000*l.* So that an increase of 50*l.* in the damage, makes an increase in the liability of the underwriters of nearly 1000*l.* Surely such a state of things, leading to such a result, cannot be deemed just or reasonable. The whole fallacy seems to consist in calling a really partial loss, a constructive total loss, which can really mean only a loss not in fact total.

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Lord TENTERDEN, C.J.—I consider it to be perfectly clear that the question whether the loss sustained is a partial or total loss is precisely the same where the value of the ship is mentioned in the policy, and where it is left open. Where the value is not mentioned in the policy, it must be ascertained by evidence; where it is mentioned, no further inquiry is necessary, because the parties have already agreed what is to be deemed the value in the event of a loss. If the experience of underwriters teaches them that it is not conducive to their interest to subscribe valued policies, they may abandon the practice in future. Then the question in this case is, was this a total loss? The jury have found that the ship was so damaged as not to be worth the costs of repairing her. In other words, they have found that though the materials were left, the ship had ceased to exist in the character and for the purposes of a ship. In short, that the ship was a total loss, for that, according to the decision



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in several recent cases upon this subject, is the legal effect and result of their finding (a). The loss in this case, therefore, is in point of law a total loss, for which the underwriters are liable, and the amount of which will be the sum agreed upon as the estimated value of the ship, deducting, of course, the value of the materials.

BAYLEY, J.—The question whether a loss is total or not, depends upon the the particular facts of each case, and the nature and extent of the injury done to the ship, quite independently of the nature of the policy effected upon her. The nature of the policy cannot vary the nature of the loss, and the question is precisely the same upon an open and a valued policy. The only difference between the two is, that in the former the assured must prove the value of the thing insured; and in the latter, its value having been previously ascertained and agreed upon, he need not.

LITLEDALE, J. was gone to chambers.

Rule refused.

(a) *Holdsworth v. Wise*, ante, i. 673; 7 B. & C. 794; and the cases there cited.

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#### HELPS v. GLENISTER.

The buying of game is prohibited in *all* cases by 58 G. 3, c. 75.

Therefore, a contract for the sale of live pheasants, for the purpose of breeding, passes no property to the purchaser, and cannot be enforced at law.

TROVER, for live pheasants. Plea, not guilty; and issue thereon. At the trial, before *Holroyd, J.*, at the last assizes for the county of Bucks, the case was this. In October, 1827, the plaintiff, who was a dealer in pheasants and resided in Middlesex, went to the defendant, who was a breeder of pheasants and resided in Bucks, and proposed to buy of him some live pheasants, which he kept exposed for sale in pens. The plaintiff then bought and paid for twenty seven old pheasants at 5*l.* 10*s.*, per score, which the defendant agreed to keep at twopence per week each, until the plaintiff chose to fetch them away. The plaintiff afterwards bought

100 young pheasants at 4*l.*, per score, and paid a deposit of 2*s.* 6*d.*, and those the defendant also agreed to keep at the same rate, until the plaintiff chose to fetch them away. Three-fourths of the young pheasants were hens, which being more valuable to a breeder than cocks, bear a higher price, and the parties calculated the price accordingly. The plaintiff did fetch away the 27 old pheasants, and 13 of the young ones, but upon his demanding the other 87, and tendering the agreed price for them, the defendant refused to deliver them, and thereupon the action was brought. The learned Judge being of opinion that the purchasing of the pheasants was prohibited by the statute 58 *G. 3*, c. 75, s. 1, and that, consequently, no property in them passed to the plaintiff by the contract, directed a nonsuit.

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*B. Monro* now moved to set aside the nonsuit, and for a new trial. If the statute 58 *G. 3*, c. 75, s. 1, prohibits the purchasing of live pheasants under such circumstances as these, it must be admitted that this action is not maintainable; but it is submitted that the statute does not extend to a case like the present. The earlier statutes upon this subject, the object of which was to prevent the destruction of game, prohibited the *selling* of game, in certain cases; and it seems clear that persons *purchasing* live pheasants, for the purpose of breeding from them, were not within those statutes. The 2 *Jac.* 1, c. 27, s. 4, enacts, that every person who shall sell, or buy to sell again, any pheasant (except pheasants reared and brought up in houses, or brought from beyond seas) shall forfeit for every pheasant 20*s.* The 5 *Ann.* c. 14, s. 1, recites, that the several laws already enacted for the better preservation of game, have been found not sufficient to prevent the destroying of game, by reason of the multitude of higlers and other chapmen, which gave encouragement to idle persons to neglect their employment to destroy the same; and enacts, that all the laws then in being for the better preservation of game, not thereby repealed, shall remain in force: and s. 2 prohibits

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any higher, chapman, &c., from buying or selling any pheasant, &c. Now, the exception in 2 *Jac.* 1, c. 27, s. 4, not being repealed, is, of course, continued in force by the express words of 5 *Ann.* c. 14, s. 1. Then, the 28 *Geo.* 2, c. 12, was passed merely for the purpose of removing doubts with respect to the meaning of the word "chapman" as used in the 5 *Ann.* c. 14, and left the law in other particulars precisely as it found it. If that be so, the buying or selling of pheasants was not prohibited before the 58 *G.* 3, c. 75, and then the present question turns entirely upon the construction of that statute. Now that statute is entitled, "An Act for the more effectual prevention of offences connected with the unlawful destruction and sale of game;" assuming, necessarily, that there may be a lawful sale of game. It is the first statute that makes the buying game an offence, for it recites that the selling game was previously prohibited, and enacts that persons buying game shall be subject to a penalty. But it makes the buying game an offence in those cases only where the selling game was an offence before; and the selling pheasants reared in houses was not before prohibited. In this case it was proved that the defendant was a breeder of pheasants, and that he exposed the pheasants in question for sale, openly, in pens. The fair presumption, therefore, was, that the pheasants had been reared in a house by him. But if this transaction was a buying of pheasants within the words, it was clearly not so within the spirit of the statute, because the object of the statute was to prevent the destruction of game, and the object of these parties was the preservation of game; for the pheasants were purchased for the purpose of breeding, and with a view to effect that purpose a larger price was given for the hen birds. *Bridger v. Richardson* (a), is an analogous case. That was decided upon the statute 3 *Jac.* 1, c. 12, the object of which was to prevent the destruction of sea fish. It was there held that "the statute prohibiting persons from wilfully taking, destroying, or spoiling any spawn, fry or brood of

(a) 2 M. & S. 568.

any sea fish, in any wear or other engine or device whatsoever, did not comprehend shell fish, and if it did, that it meant a taking for destruction, and not a taking of oysters' spawn for the purpose of removing it to beds, for further growth and maturity, to make it marketable."

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Lord TENTERDEN, C. J.—The exception in 2 *Jac.* 1, c. 27, s. 4, is not incorporated either in the 5 *Ann.* c. 14. and 28 *G.* 2, c. 12, which prohibit the selling of game, or in the 58 *G.* 3, c. 75, which makes the buying of game an offence. I should be inclined to say, therefore, that the exception is done away. But assuming that it is not, and that it may be engrafted upon the latter statute, still it was incumbent upon the plaintiff to bring himself within the exception, by proving distinctly at the trial that the pheasants in question had either been reared in a house, or brought from beyond seas. But no such proof was adduced at the trial, consequently, in either view of the case, it seems to me that the nonsuit was right.

BAYLEY, J., concurred.

LITLEDAL, J., was gone to chambers.


Rule refused.

#### The KING v. The JUSTICES of KENT.

AN order of removal from Lenham to Pluckley, in Kent, was served on the 8th of April; the sessions were held on the 15th of April. By the practice of the Kent sessions, eight clear days' notice of an intention to try an appeal must be given. The appeal was not entered at the Easter sessions, but regular notice was given of an intention to try at the July sessions. At the time of the service of the order of removal, the parish officers of Lenham were informed that Pluckley would appeal. They said, that as there would not be eight clear days for a notice, nothing could be done at the ensuing sessions. At the July sessions the Court refused to hear the appeal, on the ground that it ought to have been entered and respited at the preceding sessions. A rule nisi having been obtained for a *mandamus* to enter continuances and hear the appeal,

It is unnecessary to enter and respite an appeal, where the order of removal is served too late to try at the next sessions.

Parish officers ought to be allowed a reasonable time after the service of the order of removal, to consider whether they will appeal or not.

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*Bolland* now shewed cause, and cited *The King v. the Justices of Herefordshire (a)*.

LORD TENTERDEN, C. J.—It is quite reasonable that there should be an opportunity of appealing. The parish officers should have time to consider whether they will appeal or not. They may have been misled by the conversation with the parish officers at Lenham, in which the latter observed that they could do nothing the next sessions. It also appears to us to be wholly unnecessary to go through the form and expense of entering and adjourning an appeal which could not, according to the practice of the Court, be then tried.

Rule absolute.

(a) 3 T. R. 504.

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SAINSBURY v. GANDON.

After stay of proceedings in an action on the bail-bond, there may be a plea of bankruptcy in the original action, where the bail-bond is not ordered to stand as a security.

THE bail-bond given by the defendant in this cause having been regularly assigned, an action commenced thereon was stayed generally on payment of costs. The defendant in the original action then filed a plea of bankruptcy, which

*Fish* now moved to set aside, and referred to *Dowson v. Levi (b)*, where proceedings having been stayed in an action on the bail-bond, the defendant filed a plea of bankruptcy, *pais darrein continuance*, which the Court set aside, saying, that the only question which the Court intended to permit the party to try was, whether the debt existed.

BAYLEY, J.—The case which has been cited differs from that now before the Court in this, that there a declaration had been delivered in the original action, and the Court had directed that the bail-bond should stand as a security, a trial having been lost. As the same state of facts does not exist in the present case, I think the Court cannot prevent the defendant from pleading his bankruptcy. A plea of bankruptcy is in its nature a plea to the merits.

Rule refused.

(b) 4 B. & A. 249.

CROWDER and another v. LONG, Gent., one, &amp;c.

1828.

**ASSUMPSIT**, for money paid, and money had and received. Plea, non assumpsit; and issue thereon. At the trial before Lord *Tenterden*, C.J., at the London adjourned sittings after last term (a), the case was this. In November, 1825, the plaintiffs being sheriffs of London for that year, the defendant, who was an attorney, was consulted professionally by one *Rowley* upon the state of his affairs. *Rowley* was then indebted to the defendant, and also to one *Rounds*, who had lately been urgent for payment of his debt. The defendant advised *Rowley* to execute to him a warrant of attorney to confess judgment, and one *Jackson*, an attorney, was, at the defendant's recommendation, employed to prepare it. *Rowley* executed a warrant of attorney for 447*l.* 9*s.* on the 18th of Nov., and on the same day the defendant entered up judgment, and sued out a *fi. facias* against the goods of *Rowley*, returnable on Monday next after 15 days of *St. Martin*. The writ was delivered to one *Denham*, a sheriff's officer, who accordingly seized *Rowley's* goods. On the 26th, *Denham* was ordered by *Jackson* to accept payment of the sheriff's poundage and officer's fees, to discharge *Rowley's* goods, and to leave the warrant in the hands of one *Wood*, a servant of *Rowley's*. *Rowley* gave a written consent for the plaintiffs and their officer to keep possession of his goods, or to re-enter after the writ was returnable, and to sell upon the premises, and he agreed to pay all the expenses attending the sale. The execution was withdrawn on the same day, and on the 13th of December *Denham* received the sheriff's poundage from *Rowley*. In Hilary term, 1826, the defendant ruled the plaintiffs to return the writ, and they returned that the goods remained in their hands unsold for want of buyers. In May following, the defendant ordered the sheriff's officer to sell the

A bailiff having seized goods under a *fi. fa.* against *B.*, is authorized by *A.* the creditor to quit possession, *B.* consenting that he may return and sell. The bailiff quits possession, and afterwards returns and sells, and the sheriff pays the proceeds to *A.* Before the sale *C.* issues a *fi. fa.* against *B.*, to which the sheriff returns *nulla bona*. *C.* recovers the value of the goods from the sheriff in an action for a false return. *A.* is liable to the sheriff for the damages and costs recovered by *C.*, unless he can shew that the sheriff was conscious of the misconduct, or that the action is brought for the benefit, of the bailiff.

(a) Counsel for the plaintiffs, *F. Pollock* and *R. V. Richards*; for the defendant, *Joshua Evans*.

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goods. Notice of the sale was published on the 21<sup>st</sup> of May, and the goods were sold on the 27<sup>th</sup>. In the course of the same month another *fiery facias* was sued out against the goods of *Rumley* by one *Wade*, and delivered to the plaintiffs to be executed. In July, after the goods had been sold, and while the proceeds remained in the hands of the plaintiffs, *Wade* gave them notice not to pay over the proceeds to the defendant, upon whom the plaintiffs requested the defendant to indemnify them, which he refused to do. In November the plaintiffs paid over to the defendant the proceeds of the sale, amounting to 200*l.*, and returned *nulla bona* to the writ sued out by *Wade*. *Wade* then brought an action against the plaintiffs for a false return, and recovered 200*l.* damages; which sum, together with 95*l.* for costs, they paid to *Wade*; and they then brought the present action against the defendant to recover those sums from him. It was contended that the plaintiffs had paid the 200*l.*, the proceeds of the sale, to the defendant, with a full knowledge of all the facts, and therefore that they could not maintain this action; that *Dentham*, who knew the fact of the execution having been withdrawn, must be presumed to have communicated that fact to the plaintiffs, who were his employers; and that if not, still, in point of law, the plaintiffs must be taken to have known that fact, because, by law, the act of the officer is the act of the sheriff, and the knowledge of the officer the knowledge of the sheriff. Lord *Tenterden* told the jury that the law did not allow a creditor to put in an execution, and then first to withdraw it, and afterwards renew it; that when the defendant had once withdrawn his execution, he had abandoned it for ever, and *Wade* thereby became entitled to recover against the plaintiffs; that, although it was true that a man who pays money with a full knowledge of all the facts cannot recover it back, still it was for the jury to consider whether the plaintiffs were acquainted with the fact of the defendant's having withdrawn his execution, at the time when they paid over the money

to him; that *Denham*, clearly, was acquainted with that fact; but that although the sheriff, generally speaking, was liable for the acts of his officer, done under his authority, he was not liable for acts done without his authority, and at the request of an execution creditor. His lordship, therefore, directed the jury to find for the defendant, if they were of opinion that the plaintiffs knew all the facts which the officer knew; and to find for the plaintiffs, if they were of the contrary opinion. The jury found for the plaintiffs.

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*Joshua Evans* now moved for a new trial. First, the present action must be regarded as the action of the sheriffs' officer, and not of the sheriffs themselves; and in that point of view it is clearly not maintainable. It was the duty of the officer to continue in possession of the goods, and he was bound to know his duty. He was acquainted with all the facts of the case, and having paid over the money with full knowledge of all the facts, he cannot recover it back. *Brisbane v. Dacres* (a), *Andrew v. Hancock* (b), *Bramston v. Robins* (c), *Skyring v. Greenwood* (d), *Milnes v. Duncan* (e). Secondly, if this is to be regarded as the action of the sheriffs themselves, and not of the officer, it is still not maintainable. The act of the officer is the act of the sheriff, and the latter is liable for the misconduct of the former. *Woodgate v. Knutchbull* (f), *Peshall v. Layton* (g), *Tyte v. Glode* (h), *Sturmy v. Smith* (i), *Parrott v. Mumford* (k). Trespass *vi et armis* lies against the sheriff for taking the goods of A. instead of the goods of B., upon the sheriff's warrant under a *fi. fa.*, *Saunderson v. Baker* (l), where *Blackstone*, J., said, "the law looks upon the sheriff

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| (a) 5 Taunt. 143.            | (g) 2 T. R. 712.                                                                                     |
| (b) 1 Bro. and Bingh. 37.    | (h) 7 T. R. 267.                                                                                     |
| (c) 4 Bingh. 11.             | (i) 11 East, 25.                                                                                     |
| (d) 6 D. & R. 401; 4 B. & C. | (k) 2 Esp. N. P. C. 585.                                                                             |
| 281.                         | (l) 3 Wils. 309. And see <i>Ackworth v. Kempe</i> , Dougl. 40; <i>Smith v. Milles</i> , 1 T. R. 480. |
| (e) 6 B. & C. 677.           |                                                                                                      |
| (f) 2 T. R. 151.             |                                                                                                      |



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and his officer as one person." An action on the case lies against the sheriff, if his officer neglect to arrest a party against whom a writ has issued, *North v. Miles and another, Sheriff of Middlesex* (a), *Barker v. Green* (b); and in an action against the sheriff for a false return to a writ, what was said by the bailiff to whom the warrant was directed, when asked by the plaintiff's attorney, before the return of the writ, why he did not execute it, is evidence against the sheriff, *North v. Miles and another, Sheriff of Middlesex* (c). [Bayley, J. But where an execution creditor induces the bailiff to neglect his duty, and the sheriff is damnified in consequence, would not the execution creditor be the person properly liable to make good the damage? In such a case may not the act of the bailiff, done by the authority of the execution creditor, be fairly considered, as between the sheriff and the execution creditor, as the act of the latter?] The general rule is, that the act of the bailiff is the act of the sheriff, and there is nothing to take this case out of the general rule: that being so, the sheriff must be presumed to have known of the misconduct of his officer, and to have paid over this money with full knowledge of all the facts of the case, and then the law says that he cannot recover it back.

Lord TENTERDEN, C. J.—I should be extremely sorry to break through the general rule applicable to cases of actions brought against sheriffs for misconduct in the execution of process, namely, that the act of the bailiff is the act of the sheriff. In the present case I think that, under all the circumstances, the act of the bailiff is not, as between the sheriffs and the defendant, to be considered as the act of the sheriffs; and that we may so hold, without infringing the general rule alluded to. The sheriffs have

(a) 1 Campb. 389.

(b) 9 B. Moore, 584; S.C. 2 Bingham. 317. And see *Cameron v. Reynolds*, Cowp. 403, cited in *Cuckson v. Winter*, ante, ii. 315, (c), where it

is said that all actions for breach of duty must be brought against the sheriff, though the default be the bailiff's.

(c) 1 Campb. 389.

been made to answer for the misconduct of their officer in the former action brought against them by *Wade* for a false return to the writ sued out by him. If the officer had done his duty, and the execution of the present defendant had been in force at the time when *Wade* sued out his writ, the return of *nulla bona* made by the sheriffs to that writ would have been a true return. But the execution of the present defendant was not then in force, because the officer had neglected his duty by giving up possession, and upon that ground *Wade* recovered from the present plaintiffs the value of the goods. The question in that case was, whether *Denham*, the officer, had been guilty of misconduct, and it was found that he had. The question in the present case is very different. The jury were of opinion that the act of the officer was done without the knowledge or authority of the plaintiffs, but with the knowledge and authority of the defendant; and it was proved, that in consequence of that misconduct of the officer, so authorized by the defendant, the plaintiffs were compelled to pay to a third person the value of the very goods the proceeds of which they had previously paid to the defendant. Now, beyond all doubt, the plaintiffs are entitled to recover back the money so paid to the defendant, unless they were cognizant of the fact of the misconduct of their officer at the time when the payment was made. The jury have found that they were not *in fact* parties to the misconduct of the officer; and, as between them and the defendant, I think the knowledge and the act of the officer cannot be considered as their knowledge and their act, so as to make them *impliedly* parties to his misconduct; but that it lay upon the defendant to shew that they had actual knowledge of all the facts at the time when they paid the money to him. For these reasons I am of opinion that the plaintiffs are entitled to retain the verdict.

BAYLEY, J.—The general rule undoubtedly is, that the act of the officer is, in point of law, the act of the sheriff;

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but I think the present case forms an exception to that rule. Where the misconduct of the officer is produced by the act of the execution creditor, it is not competent for the latter to say that the act of the officer, committed in violation of his duty to the sheriff, and induced by the execution creditor, is the act of the sheriff. Here the officer was guilty of misconduct, but his misconduct was induced by the defendant. The consequence of that misconduct of the officer, so induced by the defendant, was, that the plaintiffs were obliged to pay to *Wade* the value of the same goods, the proceeds of which they had previously paid to the defendant. There was collusion between the defendant and the officer. The defendant ought not to benefit by that collusion on the one hand, nor, on the other hand, ought the plaintiffs to be compelled, by means of that collusion, to pay the value of the debtor's goods to both the creditors. Considering this as the action of the sheriffs, which we must, for the contrary has not been shewn, I think they are clearly entitled to recover from the defendant that money, which he certainly ought never to have received. If it had been shewn to be the action of the officer, the case might have been different, for then perhaps the rule, *in pari delicto melior est conditio possidentis*(a), might have been held to apply. But here the money was paid by the sheriffs to the defendant.

LITLEDALE, J., concurred.

Rule refused.

(a) *Ante*, ii. 210, 211.



## NORTON v. PICKERING.

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**ASSUMPSIT** by plaintiff as indorsee against defendant as drawer of a bill of exchange in the following form:—  
 “Two months after date pay to myself, or order, 50*l.*, value received.” The bill was accepted by *Sheppard & Co.*, and indorsed by the defendant to *Naylor* and *Ellis*, and by them to the plaintiff. At the trial before *Bayley, J.*, at the last Yorkshire assizes, it appeared that *Naylor* and *Ellis*, being indebted to the plaintiff for goods sold and delivered by him to them, had procured the defendant to draw and indorse the bill, and *Sheppard* and *Co.* to accept it, and *Naylor* and *Ellis* then indorsed it to the plaintiff. *Sheppard & Co.* had no effects in their hands either of *Naylor* and *Ellis* or of the defendant, during the time the bill was running. The defendant received no notice of the dishonour of the bill. The learned Judge being of opinion that the defendant ought to have received notice of the dishonour of the bill, nonsuited the plaintiff, but gave him leave to move to enter a verdict in his favour.

The second indorsee of a bill drawn and indorsed by *A.* and accepted by *C.*, for the accommodation of *B.*, the first indorsee, is bound to present it to *C.* for payment, and to give notice of dishonour to *A.*, though neither *A.* nor *B.* had any effects in the hands of *C.*

*Milner* now moved accordingly. It was undoubtedly decided in *Cory v. Scott (a)*, that where a bill was drawn and accepted for the accommodation of the indorsee, who, as well as the drawer, had no effects in the hands of the acceptor, a subsequent indorsee, in order to entitle himself to recover in an action against the drawer, was bound to give notice of the dishonour, as the drawer might have called on the acceptor, or the previous indorsee, for payment, if he had had such notice. The decision in that case, however, is inconsistent with a former decision of this Court in *Bickerdike v. Bollman (b)*, and with a decision of the Court of Common Pleas in *Walwyn v. St. Quintin (c)*; and it is important to reconcile the decisions upon such a

(a) 3 B. &amp; A. 619.

(b) 1 T. R. 405.

(c) 1 B. &amp; P. 652; 2 Esp. N.P.C.

515. And see *Clegg v. Cotton*, 3 B. & P. 239, S.P.

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subject, if possible. In one respect the present case is distinguishable from that of *Cory v. Scott*. It does not appear, from the report of that case, whether the plaintiff was or was not cognizant of the mode in which the bill had been manufactured; whereas here it is clear that the plaintiff was ignorant of the nature of the transaction, for he received the bill in the ordinary course of business, in payment for goods sold by him. The defendant, by putting his name to the bill as drawer, subjected himself to all the liabilities of drawer, and one of those liabilities is, that, as he had no effects in the hands of the acceptor, he became liable to pay the bill, although he received no notice of its dishonour. If it be held that this defendant was entitled to notice, the character in which he signed the bill will be entirely altered. The Court cannot look *dehors* the instrument itself, unless the party seeking to make it available be shewn to have assented to some qualification of his liability.

Lord TENTERDEN, C. J.—I think the decision in the case of *Cory v. Scott* (*a*) was right, and that it must govern the present case. I own it seems to me that it would have been more conducive to the interests of commerce, if it had been always held that the holder of a bill was in all cases bound to give notice to the other parties of the default made by the acceptor, and was in no case at liberty to give evidence of any circumstance to excuse the want of such notice. In this case the defendant rests upon the bill itself; he does not seek to avail himself of circumstances *dehors* the bill. He is the drawer of the bill, and as such, by the law of merchants, entitled to notice of its dishonour. But the plaintiff does attempt to avail himself of circumstances *dehors* the bill, and to free himself from the operation of the law of merchants, because he says that the drawer had no effects in the hands of the acceptor. The drawer's answer to that may be, "It does not follow that I am liable. You took the bill upon the understanding that

(a) 3 B. & A. 619.

you would present it to the acceptor. You were bound to do so; you had no right to speculate whether he would honour the bill or not. You should have presented it to the acceptor, and then, if he dishonoured it, have given me notice of that fact, and I should have been liable; as it is, I am discharged." This seems no more than just; for the drawer may have made arrangements with other parties, which may be defeated by the want of notice, although he may have no effects of his own in the hands of the acceptor. I therefore think that the defendant in this case was entitled to notice of dishonour, and that the plaintiff, not having given him such notice, was properly nonsuited.

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BAYLEY, J. concurred.

LITTLEDALE, J. was gone to chambers.

Rule refused.

HOLDERNESS and another, Assignees of FOXTON, a Bankrupt, v. SHACKELS.

**TROVER** for twenty tons of whale oil, of the value of 1000*l*. The first count of the declaration stated the property to be in the bankrupt before his bankruptcy; and the second count stated it to be in the plaintiffs as his assignees. Plea, not guilty; and issue thereon. At the trial before *Bayley, J.*, at the last spring assizes for the county of York, a verdict was found for the plaintiffs, damages 220*l*. 10*s*., subject to the opinion of the Court upon the following case.

*A.*, *B.*, and *C.*, part owners of a vessel, are partners in whale fishery adventures, in which the course has been for *C.*, as ship's husband, to sell the whalebone towards expenses; to

deposit the blubber in a warehouse rented by *A.*, *B.*, and *C.*, of *B.*; to divide the oil there produced; to put it into separate casks, marked with their respective initials; and for *D.*, the warehouseman, to deliver out the oil upon the order of each partner respectively, unless notice be given by *C.* that such partner's share of the disbursements is unpaid, and in that case to detain the oil until payment. 29 tons having been set apart for *A.*, and placed in casks marked with his initials, and 20 tons having been delivered to his order, he becomes bankrupt, his share of the disbursements being unpaid. Afterwards notice of the nonpayment is given by *C.* to *D.* *B.* and *C.* have a lien, as against the assignees of *A.*, upon the remaining 9 tons, for *A.*'s share of the disbursements, not abandoned by the qualified appropriation of the 29 tons, or by the assent to the removal of the 20 tons.

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The plaintiffs were the assignees of *Forston*, the bankrupt, under a commission dated 2d May, 1826, and their title to sue in that character was fully proved. The bankrupt *Forston*, jointly with one *Locking* and the defendant, and some other persons, was part owner of the ship *Jane*, a vessel belonging to Hull, engaged in the whale fishery. *Locking* was the ship's husband. The usual mode of managing the cargo was as follows:—On the arrival of the vessel at Hull from the fishery, the whalebone was taken into the possession of *Locking*, and sold by him for the part discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging to the defendant, in which there were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one *Gilchrist*, employed at the defendant's yard as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The blubber being then reduced into the shape of oil, was put into casks; each part owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship; and the particular casks containing his oil were marked with his initials in chalk. *Gilchrist* kept the key of the warehouse, and lived in the yard. After each division, the practice was for him to deliver to the separate orders of each owner the oil belonging to them, unless previously to the delivery he received a notification from the ship's husband, that the part owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. It was optional for the owner to have his oil in his own or the ship's casks. In the latter case he was to send away the oil in the ship's casks, he returning the casks when wanted, or paying for them. In June, 1825, the ship *Jane* arrived with a cargo, and the above, being the usual course, was followed on that occasion. The share

weighed and set apart for the bankrupt, *Foxton*, before his bankruptcy, was 29 tons and 36 gallons. Part of this was stowed in the ship's casks. All the casks were set apart in the ship's warehouse, and had the bankrupt's initials marked upon them in chalk. *Foxton* had, before his bankruptcy, given various delivery orders to *Gilchrist*, under which 20 tons of this oil had been delivered. The remainder, being nine tons and 36 gallons, and being all in the ship's casks, remained in the ship's warehouse at the time of the bankruptcy. In January, 1826, *Gilchrist* received orders from *Locking*, as the ship's husband, not to deliver to *Foxton* the remaining oil, as his share of the disbursements of the ship had not been paid. *Locking*, the ship's husband, became bankrupt in April, 1826. *Foxton* stopped payment in January, 1826. There were two accounts between *Locking* and *Foxton*, one being the ship's account, and the other a general account current. In the ship's account it appeared, that after charging every disbursement on account of the vessel, as if they had actually been paid by him, (except the rent of the warehouse, and the charges of boiling, which remained due to the defendant,) and after giving credit for the sale of the whalebone, and of a small portion of oil, there remained due from the bankrupt *Foxton*, at the time of his bankruptcy, in respect of his share of the ship, the sum of 56*l.* 12*s.* This sum was due to the defendant and the other owners. The other owners have paid up *Foxton's* share, by making deductions from balances which *Locking* owed them. *Locking* had not paid every disbursement before he failed; he has paid them since by money received from the other owners. Upon the general account current, there was a balance against *Locking* of 26*l.* 7*s.* 4½*d.*; but *Foxton* had credit therein for two of his own acceptances for 300*l.*, and 450*l.*, which were afterwards dishonoured. On the 8th of January last, the plaintiffs, as assignees of *Foxton*, formally demanded possession of the nine tons and 36 gallons of oil from the defendant, offering to pay him a sum which exceeded what he demanded in respect of rent and charges for boiling the blubber. This sum he had himself, by an account in his

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own handwriting, fixed at 59*l.* 6*s.* In answer to this demand the defendant stated that he wished the matter to stand over for a few days. Accordingly, on the 31st of January the plaintiff *Holderness* called again upon the defendant, and tendered to him the sum due in respect of his demand for rent and boiling, but the defendant then absolutely refused to receive the money, or give up the oil. He, however, stated that the oil was in his possession and under his control, and that he could give it up if he thought proper; but he added, that the owners of the *Jane* had instructed him not to do so. The value of the oil so detained was 220*l.* 10*s.*

*E. H. Alderson* for the plaintiffs. The plaintiffs, as the assignees of *Foxton*, are entitled to recover the nine tons of oil remaining in the ship's warehouse at the time of his bankruptcy. First, the defendants, as part owners of the ship would have had no lien upon the oil as against *Foxton*, another part owner, even if it had not been separated from the bulk. Secondly, if they could have had such a lien in point of law, still there was in point of fact nothing due to them from *Foxton* at the time of his bankruptcy, so as to entitle them to set up their lien. Thirdly, even if the defendants had a lien, and there was a debt from the bankrupt to them, still the separation of this oil from the bulk, and the marking the casks in which it was contained with the bankrupt's initials, formed an appropriation of it to him, and vested the property in it in him. If upon either of these propositions the Court shall entertain an opinion favourable to the plaintiffs, they will be entitled to recover.

Upon the first point *Smith v. De Silva* (a) is a direct authority in favour of the plaintiffs. There one of three partners in a ship and cargo, the cost and outfit of which were 4568*l.*, had paid only 410*l.*, in part of his third, and given his promissory notes for the remainder; but, before they became due, he was declared a bankrupt. It was held, that the other partners could not, by voluntarily dis-

(a) Cowp. 469.

charging the promissory notes, stand in his place, for any share of the profits: but that his assignees were entitled to and might recover a full third, both of the profits of the adventure, and of the value of the ship. So that in that case no distinction was taken between the bankrupt's share in the profits of the adventure, and his share in the value of the ship. In *Ex parte Harrison* (a) it was decided by Lord Eldon that part owners of a ship are interested in it not as joint tenants, but as tenants in common, and, therefore, that upon the bankruptcy of one part owner, his share passed to the assignees under the commission, without being specially liable to the claims of the other part owners, in respect of their disbursements and liabilities on account of the ship. In *Ex parte Young* (b), a similar case, the same learned Judge came to the same decision, after having, as it appears, given the subject the fullest consideration, on account of the stress laid in argument upon a case of *Doddington v. Hallett* (c), in which Lord Hardwicke had come to a contrary decision, and which Lord Eldon then, for the second time, deliberately overruled. Those cases go farther than is necessary for the present, because they establish that even for a specific balance the other part owners would have no lien against the bankrupt; whereas here the other part owners claim a lien for a general balance.

Secondly, in this case there was nothing due from the bankrupt to the other part owners. *Locking*, the ship's husband, took the whole upon himself. If there was any debt at all, it was due, not to the other part owners, but to *Locking*; and a debt to *Locking* could not confer a lien upon the other part owners. The lien was destroyed on taking the bills.

Thirdly, the property in the oil had vested in the bankrupt, prior to his bankruptcy. He had the legal, if not the actual possession of it. It had been separated from the

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(a) 2 Rose, 76.

(c) 1 Vez. sen. 497.

(b) 2 Ves. &amp; B. 242; 2 Rose, 78, n.

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bulk for him, and had been put into casks upon which his initials (a) were marked. The case, indeed, does state that it was the custom not to deliver unless the demand of the ship's husband was satisfied. But here a delivery of part had taken place, for the bankrupt was allowed to dispose of 20 tons out of the 29; and all the casks were marked with his initials, and he was charged with warehouse rent. Now *Hurry v. Mangles* (b) is an authority to shew that the latter circumstance amounted to a complete delivery to the bankrupt of the nine tons, because it was there decided, that if goods, after they are sold, remain in the warehouse of the vendor, and he receives warehouse rent for them, it amounts to a delivery of the goods to the vendee, so as to put an end to the vendor's right of stopping them *in transitu*. [*Bayley J.* The action there was brought by a person who was a *bonâ fide* purchaser from the vendee.] It was; but Lord *Ellenborough's* judgment proceeded upon the general principle. He said, "The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer. If there was any conspiracy or contrivance on the part of the plaintiffs to cheat the defendant out of the price of the goods, proof of that will be an answer to this action; but it would be overturning all principles to allow a man to say, after accepting warehouse rent, 'the goods are still in my possession, and I will detain them till I am paid.' The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key." The bankrupt's right, therefore, to the nine tons in this case was, by his being charged with warehouse rent, as complete, as if they had been in his own actual possession. Besides, the delivery of the 20 tons to the bankrupt, was, in point of law, a delivery of the whole 29; as, where a buyer removes from a warehouse part of an entire quantity of goods sold at a fixed and entire price, the allow-

(a) *Post*, 35, (a).

(b) 1 *Campb.* 452.

ing him to do so amounts to a delivery of the whole. *Slubey v. Heyward* (a), *Stoveld v. Hughes* (b), *Hammond v. Anderson* (c). [Bayley, J. Those were all cases upon the question of the right to stop *in transitu*.] They were so; but they involve the principle now contended for, and shew that the property in this case had vested in the bankrupt before his bankruptcy, and therefore that the goods are recoverable by his assignees.

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*Parke, contrà*. Upon the first point a distinction is drawn in *Ex parte Young* (d) between interest in the freight and in the ship. In *Abbott on Shipping* (e) it is noticed, that in *Smith v. De Silva* the point was not brought before the Court. Secondly, something was due from *Foxton*, and prior to the second demand the bills had been dishonoured. Here he was stopped by the Court.

LORD TENTERDEN, C. J.—I am of opinion that the assignees are not entitled to recover these goods. This is not the case of a claim of lien upon a share of a ship, but of a claim, by part owners of a ship, engaged together in an adventure, of a lien upon a share of the proceeds of that adventure. Now it is a general and well established principle of law, that if one of several partners become bankrupt, his assignees are not entitled to any share of the partnership effects, until they have satisfied all that is due from him to the partnership. The case of *Smith v. De Silva* (f) is intricate and entangled, and it is not very easy from the report to form any clear or perspicuous notion of the facts. *De Silva* appears originally to have been rather the agent than the partner of the other parties. In the first instance he seems to have advanced money, not as a part owner of the ship, nor as a partner in the adventure, but as a person appointed by all the part owners and adventurers to manage

(a) 2 H. Bl. 504.

(b) 14 East, 308.

(c) 1 N.R. 69.

(d) 2 V. & B. 242; 2 Rose, 78, n.

(e) 5th edit. 77; 4th edit. 98.


(f) Cowp. 469.

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the adventure for them. He afterwards acquired an interest, by purchasing a part of the ship, and so became a partner in the adventure. But he was not originally a partner. *Smith v. De Silva*, therefore, was a case of peculiar circumstances, and may have been properly decided with reference to those peculiar circumstances, without breaking in upon the general principle to which I have alluded. Then supposing that the other part owners in this case had originally a lien upon the proceeds of the adventure, has any thing occurred to take it away? It is said that they had no lien as against the bankrupt, because there was no debt owing from the bankrupt to the other part owners. But if the account be looked at as between *Locking*, the ship's husband, and the bankrupt generally, it appears beyond all question that there was a debt owing from the bankrupt to the other part owners, because they were eventually obliged to pay the expenses which had been incurred prior to his bankruptcy. The next question is as to the effect of the separation of the bankrupt's share of the oil from the general bulk, upon which great reliance has been placed on the part of the plaintiffs. It has been urged that this separation amounted to an appropriation of that portion of the oil to the bankrupt, and that the property thereby vested in him. But in order to decide whether the property did vest in him or not, it is necessary to look at the conduct and practice of the part owners of the ship in antecedent voyages, with the view, particularly, of ascertaining what was the effect of marking certain casks of oil with the initials of certain part owners. The case states that when the blubber had been reduced into oil, each part owner's share was weighed out, and placed separately in the warehouse rented by the owners of the ship, and the particular casks containing his oil were marked with his initials in chalk; that *Gilchrist* kept the key of the warehouse and lived in the yard; that after each division, the practice was for *Gilchrist* to deliver to the separate orders of such owners the oil belonging to them, unless, previously to the delivery, he re-

ceived a notification from the ship's husband, that the part-owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. That having been the conduct and practice of the parties, it seems to me that the separation of a particular part-owner's share of oil from the general bulk, and the marking the casks containing it with his initials, did not amount to an absolute appropriation of those casks and their contents to that part-owner, but to a qualified appropriation only, enabling him to obtain possession of the goods, unless the ship's husband afterwards prevented him by giving notice to the warehouseman that he had not paid his share of the expenses. So, in this particular case, I think the separation of the oil in question from the bulk, and the marking the casks which contained it with the initials of the bankrupt, amounted not to an absolute, but to a qualified appropriation only of the casks and their contents to the bankrupt. The property in the goods might be thereby vested in him, but not absolutely; it was vested conditionally, subject to be divested, as in point of fact it was, by the intervention of *Locking*. It seems to me that both the law and the justice of the case are with the defendant, and that the action is not maintainable.

BAYLEY, J.—Where there is a joint adventure which produces certain goods or profits, the proper course is, first, to deduct all the expenses which have been incurred in order to obtain those goods or profits, and then to divide the residue among the adventurers, in proportion to the share to which each is respectively entitled. In this case the joint adventurers obtained certain goods, namely, a quantity of oil in bulk. No partner, or representative of a partner, had a right to receive his aliquot part of that oil, until he had paid his aliquot part of the expenses of procuring it. That would be equally the case, whether the part-owner became bankrupt, or continued solvent. If he

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continues solvent, he may pay his share of the disbursements in money. If he does not pay it in money, the other part-owners have a right to retain an aliquot part of the goods obtained by the adventure, to cover that share of the disbursements which he ought to pay. In this case, *Foxton*, one of the part-owners, became bankrupt. If he could have paid his share of the disbursements in money, there would have been 29 tons of oil coming to him. But he was not able to pay in money, therefore, the justice and the law of the case, as it appears to me, is, that his share of the disbursements should be defrayed out of his 29 tons of oil, and that he should not be entitled to claim his share of the oil, until he had paid his share of the expenses. It is said there has been a delivery of the oil to the bankrupt in this case, and that by means of that delivery, his rights, and those of his assignees, are different from what they might otherwise have been. But I am of opinion that there has not been a perfect delivery. It would have been perfect if the other part-owners had been dispossessed of the oil, but they never were. The oil remained in the joint warehouse; it continued to be joint property; a part, indeed, was removed, but the removal of that part did not vary the right as to the rest. Then, it is said, there has been a change of possession in this case, by means of *Locking* having debited the bankrupt in account with his share of the warehouse rent. But the bankrupt must have paid his share of the warehouse rent, before he would have been entitled to remove the oil in specie; or it would have been deducted out of his share of the produce of the oil, if he had compelled the other part-owners to sell the oil, for the purpose of paying his share of the expenses. The practice being for the warehouseman to retain the oil, until each part-owner's share of the expenses had been paid, I think the fact of debiting the bankrupt with his proportion of the warehouse rent had no effect; it was merely a mode of taking an account of what was his share of the expenses in that particular. I am, therefore, of opinion that the

plaintiffs have not made out their right to the nine tons of oil, and that the defendant is entitled to the judgment of the Court.

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LITTLEDALE, J., was in the Bail Court.

Postea to the defendant (a).

(a) Si dolium signatum sit ab emptore, Trebatius ait, traditum id videri; Labeo, contrà; quod et verum est; magis enim *ne summu-*  
*tetur* signari solere, quam ut tradere tum videatur. Dig. 18, 6, 1, 2.

JAY, Gent., one, &c. v. COAKS.

IN this case the plaintiff, an attorney, in December, 1827, delivered his bill of costs to the defendant, for business done for him. The defendant neither paying the bill, nor applying for a Judge's order for its taxation, within a month from the delivery, the plaintiff commenced an action against him for the amount, after which, on the 14th of February, 1828, the defendant did obtain a Judge's order to tax the bill. Accordingly, on the 9th of June, the bill was taxed, and more than a sixth was taken off; upon which the defendant obtained a rule to refer it to the Master to allow him the costs of the taxation. The plaintiff afterwards obtained a rule *nisi* to discharge that rule, upon the ground that a party was entitled to the costs of taxation in those cases only, where a sixth part of the bill was taken off upon a taxation made pursuant to the provisions of the statute 2 Geo. 2, c. 23, s. 23, which required the application for taxation to be made within a month from the delivery of the bill. In the course of last term,

If an attorney's bill be referred for taxation *after* he has commenced an action upon it, the defendant is not entitled to the costs of taxation, though the bill be reduced one-sixth by the Master.

*F. Kelly* shewed cause. The statute makes no distinction between a taxation made before, and one made after, action brought; therefore there is no ground for the Court to make such a distinction. The enactment is general, namely, that if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxa-



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tion. Here the bill taxed was less by a sixth part than the bill delivered, and therefore the case is within the statute.

*Parke, contra.* This case is not within the operation of the 2 Geo. 2, c. 23, s. 23. Before that statute passed it was in the power of the attorney to sue his client immediately after delivering his bill. By that statute, the attorney is restrained from bringing any action for the amount of his bill, until a month has elapsed after the delivery of the bill; and upon application of the party chargeable, and upon his submission to pay the sum that upon taxation shall appear to be due, the bill may be referred to taxation, *although no action shall be then depending touching the same*; and the Courts may award the costs of *such taxation*; and if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation. The statute, therefore, provides for referring a bill for taxation *before action brought*, and declares that the costs of *such taxation* shall be paid by the attorney if a sixth part of the bill is taxed off; clearly confining that regulation respecting the costs to cases where the bill is referred before any action is brought. And this is consistent with the very object of the legislature in making this enactment, which evidently was to prevent the attorney from loading his client with the costs of an action before the client could by possibility cause the bill to be taxed, and so ascertain what sum he was really liable to pay. If the action had been tried, and the jury had by their verdict reduced the bill one-sixth, the defendant would not have been entitled to any costs; or if a verdict had been taken, subject to a reference to the Master, and he had reduced the bill one-sixth, the defendant would not have been allowed the costs of the reference. The point has been expressly decided by the Court of Common Pleas in the recent case of *Benton v. Bullard (a)*, where it was held that the costs of taxing an attorney's bill cannot be allowed to a party who succeeds in striking off a sixth part, if the order for taxing is not ob-

(a) 4 Bingh. 561.

tained until after an action has been commenced on the bill. The prothonotary there had refused to allow the party the costs of taxation, on the ground that the attorney had commenced an action on the bill before the party obtained an order for taxation, alleging, that he had always understood that to be the practice: and the Court said, that that was the practice, and that it had been so ruled repeatedly.

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*Cur. adv. vult.*

In the course of this term, judgment was delivered by

Lord TENTERDEN, C.J.—We have considered this case and have looked into the act of parliament, and we are of opinion, upon the authority of the case of *Benton v. Bullard*, that the defendant was not entitled to the costs of taxation, although a sixth part of the bill had been taken off. Therefore the rule obtained for discharging the rule for allowing those costs must be made absolute.

Rule absolute (a).

(a) See *Dickens v. Woolcot*, 8 *gins v. Woolcott*, 5 B. & C. 760; 1 D. & R. 589, S.C. per nomen *Higgins* Chit. Stat. 63, (f) and (h).

#### HANDLEY v. LEVY.

THE defendant in this case was arrested and held to bail for 19*l*. The plaintiff recovered only 40*s*. A rule was obtained for allowing the defendant his costs under the statute 43 *Geo.* 3, c. 46, s. 3. The action was commenced in the Palace Court, but was removed into this Court by the defendant.

*Thesiger* shewed cause against the rule. This Court has no jurisdiction in this case. The 43 *Geo.* 3, c. 46, s. 3, enacts, that where a defendant shall be arrested, and the plaintiff shall not recover the sum for which the defendant has been so arrested, the defendant shall be entitled to

Where plaintiff arrests defendant without probable cause for a larger sum than he recovers, in an action commenced in the Palace Court and removed into this Court, this Court has no jurisdiction to allow defendant his costs under 43 *Geo.* 3, c. 46, s. 3.

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costs of suit, provided it shall be made to appear to the satisfaction of *the Court in which the action is brought*, that the plaintiff had not any reasonable or probable cause for arresting the defendant for such sum. Here the action was brought in the Palace Court, therefore this Court cannot interfere. He cited *Costello v. Cavley (a)* as decisive of the point.

Lord TENTERDEN, C. J.—The case cited is rightly decided, and must govern the present case. The action having been brought in the Palace Court, this Court has no power under the statute to interfere. The rule therefore must be discharged.

The other Judges concurred.

Rule discharged.

(a) 1 Moore & P. 315; S. C. per nomen *Costello v. Corlett*, 4 Bingham 474, where the Court of Common Pleas held that they could not tax the defendant his costs under the

43 Geo. 3. c. 46, s. 3, in an action commenced in the Palace Court and removed into the Court of Common Pleas.

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TENON v. MARS.

An affidavit of debt, stating that defendant was indebted to plaintiff "as liquidator of an estate, duly appointed by the law of France," is defective, for not shewing that plaintiff, as liquidator, is by the law of France entitled to sue.

THE defendant was arrested by virtue of a Judge's order, upon the following affidavit:—" *Jacques André Tenon*, of the street called Rue Hautefeuille, in the city of Paris and kingdom of France, *liquidator* (legally appointed by the laws of France) of the estate of *Jacques Vernarel* and *Jacques André Tenon*, lately carrying on business in co-partnership as booksellers in the said city of Paris, under the name, style and firm of *Vernarel and Tenon*, maketh oath and saith, that *Prosper Mars* is justly and truly indebted unto this deponent, as such liquidator as aforesaid, in the sum of 4452 francs, current money of France, under and by virtue of twelve several promissory notes drawn by the said *Prosper Mars*, and made payable to the order of the said *Vernarel* and *Tenon*, at certain days long since past;

one of such promissory notes being for the sum of 800 francs, nine other of such promissory notes being for the sum of 300 francs each, one other of such promissory notes being for the sum of 600 francs, and the other of such promissory notes being for the sum of 352 francs; which said several sums make together the sum of 4452 francs: Saith, that the said sum of 4452 francs, current money of France, is this day worth, in Paris and London, the sum of 178*l.* 1*s.* 10*d.* and upwards, British sterling." The defendant obtained a rule, calling upon the plaintiff to shew cause why the bail bond should not be given up to be cancelled on the defendant's filing common bail. This rule was obtained upon the affidavits of the defendant and of *Henri D'Emden*. From the affidavits filed in support of the rule, it appeared that the plaintiff and defendant and *Vernarel* were aliens, and subjects of France; that defendant never contracted any debt with plaintiff, or with *Vernarel* and plaintiff, within this realm or elsewhere out of the kingdom of France; and that defendant never within this realm, or elsewhere out of the kingdom of France, made any promise to pay any sum of money either due or alleged to be due from him to *Vernarel* and plaintiff, or either of them; that the plaintiff's cause of action, if any, arose entirely in the kingdom of France, between three and four years ago, at which period defendant was resident in France; that no judgment was ever obtained against him for the alleged debt, or any part thereof, in any Court whatsoever; that defendant did not leave France with any intent to defraud, delay, or avoid his creditors, or any of them. *D'Emden* swore that he was well acquainted with the law of France, which he had studied for six years and upwards; that by the law of France respecting arrests of the person, which had existed and was in force from the year 1814, and which has been in force from that time hitherto, no French subject in the kingdom of France could or can be either arrested or imprisoned for any debt, whether the same were due upon any bill or bills of exchange, promissory note or promissory

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notes, or otherwise, till after judgment obtained thereon in some competent jurisdiction; that by article (No.) 2067 of the Code Civil, which has been for more than ten years last past, and still is in full force as the law of France, under the title 16, "De la contrainte par corps en matiere civile," it is ordered and enacted as follows, that is to say, "La contrainte par corps dans les cas même où elle est autorisée par la loi, ne peut être appliquée qu'en vertu d'un jugement;" that the following is a correct translation of the said title 16 of the code above referred to, that is to say, "Of constraint of the body in civil matters;" that the following is a correct translation of the said code, that is to say, "Constraint of the body, even in cases where it is authorized by the law, can only be applied by virtue of a judgment."

*Manning* now shewed cause. This rule was obtained upon the authority of *Melan v. Duke de Fitzjames* (a).

(a) 1 Bos. & Pull. 138. In that case two Judges of Common Pleas against *Heath, J.*, made a rule absolute for cancelling the bail bond where the affidavit stated that the defendant was indebted to the deponent in the sum of 1000*l.* and upwards, on a certain deed under the hand and seal of the defendant, bearing date &c., made and executed in France according to the laws there in force, to and in favor of the deponent, and it was stated by the defendant's affidavit that by the laws of France and particularly by the 6th article of the 34th Title of the Ordinance or Law of 1667, which was in full force when that deed was made, not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort, and that the only case in which a person could be arrested or imprisoned by the laws of France for debt, was upon a bill of exchange or a commercial engagement, and that in every other case, the property only was liable to be seized. But upon the same point being taken by *Erskine* in *Imlay v. Ellefsen*, 2 East, 455, Lord *Ellenborough* signified his dissent from the determination, and the point was abandoned. If the objection were tenable, it would seem to follow that a foreigner could not be sued by *latitat* or *capias* at all, where the cause of action arose abroad and was not such as to authorize an arrest in his own country. For if a *latitat* can issue, the sheriff is excused from taking the body only.

[Lord *Tenterden*, C. J. Your affidavit does not state, that by the law of France a liquidator has authority to sue.] It states that the plaintiff is liquidator, legally appointed by the laws of France, of a late copartnership estate of himself and *Vernarel*, and that the defendant is indebted to plaintiff as such liquidator, which he could not be unless the liquidator were empowered to bring actions in his own name. [Lord *Tenterden*, C. J. That is merely a legal inference.]

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BAYLEY, J.—The affidavit of debt is defective upon the face of it. It shews a cause of action in two persons, and an arrest by one. That one arrests in the character of liquidator; but he does not shew that according to the law of France he is allowed under such circumstances to sue in his own name.

Rule absolute.

by reason of the plaintiff's non-compliance with the statutes which require an affidavit of the cause of action to be filed before the mandatory or *capias* clause in the *latitat* can be enforced. Besides which, by the common law of England, no defendant in a civil suit is liable to an arrest in any case; nor by statute, until he has made default in appearing upon a summons or an attachment. This principle is evaded in the case of a *latitat*, or of a bill of Middlesex, by supposing that the defendant has made default in his appearance upon a non-existing *queritur* founded upon an imaginary trespass *vi et armis* in Middlesex, wholly collateral to the real cause of action. In the Common Pleas the evasion is by supposing either that the defendant

has made default upon a summons, or that he had no goods whereby he could be attached. In the Exchequer the *capias*, whether it be a *capias quominus* or a *capias* of privilege, issues upon a supposed return of *non venit* upon an imaginary *venire facias ad respondendum*. (1 Burton, 99. And see Mann. Exchequer of Pleas, 58; 4 Hawk. P. C. 139.) Where no default has been made, the common law required security, not from the defendant, but from the plaintiff. If the attendance of a subject is to be secured by imprisoning his body upon such palpable fictions, there seems to be no reason for being more scrupulous with respect to foreigners, whose presence would be less likely to be obtained upon a simple summons.

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WHITMASH and another v. GENGE.

Upon a bond conditioned that a clerk shall account for all moneys received on account of his employers, and shall act with fidelity and punctuality in the matters intrusted to him, entries made by the clerk in the books kept by him in the course of his employment, whereby he charges himself with the receipt of moneys on account of his employers, are, after his death, *prima facie* evidence against his sureties, the obligors, of the receipt of such moneys. But it is open to the latter to shew that the entries are incorrect; though by so doing they will render themselves liable as upon a breach of the second branch of the condition.

**DEBT** on bond, dated 6th October, 1824. The condition, after reciting that plaintiffs had taken one *Pitman* into their employ as a clerk, and that defendant had agreed to become bound for the fidelity of *Pitman* in such employ, was declared to be, that *Pitman* should from time to time and at all times, so long as he should be in the service of plaintiffs, faithfully account for, and well and truly pay over and deliver unto plaintiffs, their executors, &c., or to such other persons as they or either of them should direct, all sums of money, books, papers, matters and things, of or belonging to the plaintiffs, which should from time to time and at any time thereafter be received by or come to the hands of *Pitman*, and also that he should act and conduct himself at all times with fidelity, integrity and punctuality, in and concerning the matters and things which should or might be reposed in or intrusted to him as such clerk. Plea; that *Pitman* did from time to time and at all times, so long as he continued in the service of the plaintiffs, faithfully account for, and well and truly pay over and deliver to the plaintiffs, all sums of money, books, papers, matters and things, which at any time and from time to time were received by or came to the hands of the said *Pitman*, and did act and conduct himself at all times with fidelity, integrity and punctuality, in and concerning the matters and things which were reposed in or intrusted to him as such clerk. Replication; that during the time that *Pitman* so remained in the service of the said plaintiffs as such clerk, to wit, on the 7th of October, 1824, he, *Pitman*, as such clerk, had and received for and on account of the plaintiffs, divers sums of money, amounting to 2000*l.*, belonging to the plaintiffs; yet that *Pitman*, although often requested so to do, had not accounted for or paid over the same, or any part thereof, to the said plaintiffs. Rejoinder; that *Pitman* did not, as such

clerk, have or receive, for or on the account of the plaintiffs, the sums of money mentioned in the replication. At the trial before *Littledale, J.*, at the last summer assizes for the county of Somerset (*a*), the following facts appeared. The plaintiffs were bankers at Yeovil, in Somersetshire. *Pitman* became their clerk in October, 1824, and continued to act as such till February, 1826, when he died. It was his duty as such clerk to keep the plaintiffs' books. In order to prove that *Pitman* was indebted to the plaintiffs at the time of his death, the plaintiffs produced the book kept by him, in which were entries in his hand-writing of moneys received by him as their clerk. It was contended on the behalf of the defendant that these entries were merely the unsworn statements of *Pitman*, and were therefore not evidence against the defendant. The learned Judge received the evidence, and directed a verdict for the plaintiffs, giving the defendant leave to move to enter a nonsuit.

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*Merewether, Serjt.*, now moved accordingly. The entries in the books were not admissible. The persons who paid the money were admitted to be alive, and should have been called. *Cutler v. Newlin* (*b*), *Goss v. Watlington* (*c*). In the latter case the Court decided in favour of the admissibility of the entries, on the special ground that the books were of a public nature. Here there is no stipulation that the principal shall deliver up books. In *Goss v. Watlington* the Court doubted whether the receipts signed by the principal were admissible.

LORD TENTERDEN, C. J.—It is not necessary to say whether, if *Pitman* had merely said that he owed so much, that statement would have bound his sureties. It appears that *Pitman* was taken into the plaintiffs' employ as a clerk,

(*a*) Counsel for the plaintiff, *Wilde, Serjt.*; for the defendant, *Merewether, Serjt.* (b) Mann. N. P. Digest, 2d edit. 137. (c) 3 Bro. & Bingh. 132.



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on which occasion the defendant agreed to enter into a bond for *Pitman's* fidelity in his employ. His lordship, after stating the pleadings, proceeded thus:—Upon this issue it lay upon the plaintiffs to shew that *Pitman* had received money for which he had not accounted, and the question is, whether it was competent to them to shew that fact by the books kept by *Pitman* in the discharge of his duty as their clerk. I think the entries in those books, in which he charges himself with money received for the plaintiffs, are evidence after his death in this action, which is brought upon a bond conditioned for the faithful discharge of his duty as clerk. It was the duty of *Pitman* to make entries in his masters' books of all sums received by him on their account. *Pitman* must therefore either have misconducted himself in making those entries, or he must have received the money with which he has charged himself. We must presume that he acted right, unless the contrary be shewn by the defendant, the effect of which would only be, to give the plaintiffs a cause of action in respect of that part of the condition which requires that *Pitman* shall act and conduct himself at all times with fidelity, integrity and punctuality, in and concerning the matters or things reposed in or intrusted to him as clerk (a).

BAYLEY, J.—Though in *Goss v. Watlington* a distinction was pointed out between public and private books, the judgment of the Court did not proceed upon that distinction, but upon the ground that the entries were contained in those books which, by the condition of the bond, were to be faithfully kept. So here, the bond is conditioned for the fidelity of *Pitman* in the matters intrusted to him as clerk.

Rule refused.

(a) The bond being equally forfeited by a breach of any branch of the condition, the only substantial difference, supposing the defendant had assigned such a breach, would have been in the assessment of damages under 8

& 9 W. 3, c. 11, which for mere inaccuracy in keeping the books would probably be nominal, unless the jury thought that the inaccuracy had been used as a cloak for fraud.

BERNHARD, BARON VON LINDENAU, v. DESBOROUGH.

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**ASSUMPSIT.** The defendant was sued as secretary to the Atlas Assurance Company, on a policy on the life of the late Frederick the Fourth, Duke of Saxe-Gotha, for £3200 for one year; £2560 for two years; £1920 for three years; £1280 for four years; £640 for five years; bearing date 16th June, 1824. Plea, non assumpsit; under which the sum of 160*l.* 10*s.* (a), (being the amount of the premium) was paid into Court upon the count for money had and received. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster, after last Trinity Term (b), the following facts appeared: In 1824 an insurance was effected with the Union Assurance Company, whose agents in Germany, E. G. Bernhardt and Co. submitted certain questions (c) to the medical attendants of the Duke, who stated that the Duke was *hindered* (c) in his speech, but did not advert to the state of his mental powers. The last of these questions was, "Is there any circumstance within your

A party effecting a life insurance is bound to disclose every material fact within his knowledge, whether he believes such fact to be material or not.

(a) This appears to exceed the premium usually charged.

(b) Counsel for the plaintiff, *Brougham*, *F. Pollock*, and *Brodrick*; for the defendant, Sir *James Scarlett*, *Gurney*, and *Chitty*.

(c) Questions.

Answers of Dr. *Dorl*.

Answers of Dr. *Ziegler*.

6. Are you acquainted with his ever having been afflicted with a ruptare, gout, dropsy, cancer, asthma, consumption, vertigo, fit, hemorrhage of any kind, complaint of the liver, or other disease, or of his having any symptoms of disease?

6. As his Prime Physician, I have the duty of visiting his Highness every day. In the month of April, 1823, he was ill of a slime fever (d); since then he has been in the most perfect health (e). His Highness is totally free of all the here mentioned deficiencies and diseases, with the exception, that since 1809 he has a dimness of sight (amaurosis) (f) in his left eye, which can be operated; and that since 1819 he is hindered in the faculty of speaking, in consequence of a sustained inflammation of his chest.

6. In the month of April, 1823, the Duke was ill of a slime fever (d), but since then quite as well as he was before. He was not afflicted with any of such diseases, but has, since 1809, a dimness of sight (amaurosis) (f) upon his left eye. He is, since 1819, also hindered in the faculty of speaking (g), which has been occasioned by an inflammation in the chest.

(d) "Schleim," mucus, phlegm; hence, "Schleim-fieber," catarrh, or catarrhal fever.

(e) "Vollkommen wohl befunden."

(f) "Den grauen starr."

(g) "Auch leidet er seit 1819, an

einem unvernügen zu sprechen (welches) aus einer brustentzündung entstanden ist." Which means literally this: "from 1819 he has been suffering under an inability to speak, occasioned by an inflammation in the chest."

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knowledge which the directors ought to be acquainted with?" This was answered in the negative. The agent also stated to the directors of the Union, "that the Duke had led a dissolute life in former days, by which he had lost the use of his speech, and, according to some, also that of his mental faculties, which, however, was contradicted by the medical men." An application was made to the Union to effect a further insurance, which they declined, on the ground that by their rules they were restricted to the sum already insured, and a proposal being made to the Atlas, the information furnished by the agent to the Union was communicated to the Atlas, and similar declarations were signed by the plaintiff, and by the medical attendants of the Duke as before, and the policy in question was completed. On the death of the Duke, in 1825, it was discovered that the mental weakness and loss of speech arose from an incysted tumour pressing upon the brain, an effusion from which had occasioned death. Mr. Green, a surgeon, stated, that in his opinion the state of the Duke's mental powers ought to have been communicated as lead-

*Questions.*

10. Are you acquainted with any circumstances having a tendency to the shortening of his life, or which can make an Insurance upon his life more than usually hazardous?

11. Are there any other circumstances within your knowledge which the Directors ought to be acquainted with?

*Answers of Dr. Dori.*

10. Such circumstances I do not know, as far as human knowledge may go (a), and such apprehension may be of less value in the person of his Highness than of any other person, considering the great attention to preserve his health.

11. Other circumstances by which the life of his Highness could be endangered are utterly unknown to me.

*Gotha, Jan. 14, 1824.*

(L. S.) GEORGE DORL,  
 Medical Counsellor (b)  
 and Prime Physician to  
 the person of his Highness the Duke Frederick IV. of Gotha.

*Answers of Dr. Ziegler.*

10. The Duke is in good health, and every thing is done to preserve the good state of his health, and it is consequently to be expected that no circumstance will occur which might endanger his life, or which would make an Insurance upon his life more than commonly dangerous.

11. Other circumstances I do not know.

*Gotha, Jan. 17, 1824.*

(L. S.) D. J. M. ZIEGLER,  
 Medical Counsellor (b)  
 and Second Physician to  
 the person of his Highness the Duke Frederick of Gotha.

(a) "Dergleichen umstände sind, so weit menschliche einsicht reichen kann, mir nicht bekannt; vielmehr u. s. w.:" which means, "Circumstances

of this nature, as far as human observation can reach, are unknown to me; on the other hand, &c."

(b) "Hofrath" "aulic counsellor."

ing to a suspicion of some organic defect in the brain, but that he himself should not have inferred the existence of any such tumour. The learned Judge was of opinion that the weakness of mind should have been communicated; observing that the state of the intellect, especially as connected with the state of the speech, was most important; and he said he should tell the jury, "that if any fact in *their* opinion material for the information of the office, respecting the health of the party known to the party certifying, had not been communicated, the policy was void." Upon receiving this intimation, which his lordship minuted and read, the plaintiff's counsel elected to be nonsuited (a).

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*Brougham* now moved for a new trial. The effect of the non-communication depended upon the opinion of the assured as to the materiality of the fact, and not upon the opinion of the jury upon that point. The assured is bound to give true answers to all questions put to him whether they are material or not. But if he knows another fact, to which he is not interrogated, the contract is not void unless the party himself conceived it to be material. This is the case also in marine insurances. If a fact be suppressed, which all the world would think material, as

(a) Campbell, *amicus curiæ*, referred to the case of *Maynard v. Rhodes*, 5 D. & R. 266.

Upon the authority of that case the Court of Common Pleas held, in *Everett v. Desborough*, 5 Bingham 503, that in an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance office undertakes

to do all that is required by his office. Though the decision in *Everett v. Desborough* professes to be founded on *Maynard v. Rhodes*, it appears (5 Bingham 512,) that in the latter case, Lyon, the life insured, was not only known to the plaintiff, but was sent by him to the office on the occasion on which he gave the information which was most materially false; besides which, the declaration in *Maynard v. Rhodes* expressly alleged, as part of the consideration for the defendant's promise, that the statement made by Lyon was true.

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an attack of apoplexy, it would be evidence of fraud. It might fairly be left to the jury whether it was possible that the assured could believe such a circumstance to be immaterial. In *Mayne v. Walters* (a), Lord Mansfield said it must be a fraudulent concealment to vitiate a policy. There the underwriters urged that the assured had not communicated the material fact of there being an English supercargo on board. To which the assured answered, that they did not know that the fact was material. Yet the materiality was clearly shewn: for upon proof of the existence of the rule of war of 1756, and of there being an English supercargo on board, there was evidently a breach of neutrality. [Bayley, J. In *Huguenin v. Rayley* (b), it was held to be a question for the jury whether a fact not communicated was or was not material.] Both materiality and intention should concur; materiality alone is not conclusive. Secondly, another circumstance ought to have gone to the jury here, namely, whether the fact supposed to be material was within the knowledge of the insurers. The insurers had no right to complain of the non-communication of a fact respecting which they have information *aliunde*. In *Carter v. Boehm* (c), Lord Mansfield says, "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew." Here the certificate of Bernhardt and Co. had been handed over to the Atlas. It is not necessary in a life policy to state more than relates to disease and to bodily health. Where there is a warranty, the assured is not bound to give information. No fact waived by warranty need be communicated. The warranty in this policy applies to apparent bodily health, and the fact which it is contended ought to have been communicated, applies to apparent bodily health. [Bayley, J. In *Bufe v. Turner* (d), the assured omitted to communicate the fact, that a fire had broken out in the adjoining premises.] The jury may have thought that the assured considered the fact to be ma-

(a) Park, Ins. 195, 363.

(b) 6 Taunt. 186, *post*, 54, (c).


(c) 3 Burr. 1905; 1 W. Bl. 593.

(d) 6 Taunt. 338; 2 Marsh. 46.

terial. Though they negative fraud, they evidently thought that the plaintiff was chargeable with a *wrongful* suppression of information. In that case it does not appear upon what ground the Court refused the new trial. Though not satisfied with the verdict in the way in which it was given, they may have seen no reason to doubt that a similar verdict would be given again. [*Bayley, J.* That was a verdict, which was conclusive; this is a nonsuit.] It would be very inconvenient if the assured should be taken to warrant that all facts which he did not communicate are immaterial. Physicians in one country have one set of opinions; in another totally different doctrines prevail. It is an insurance which depends so much upon opinion, and so much more upon opinion than those things the suppression or disclosure of which comes in controversy in cases of fire risks, or sea risks, that a less strict rule ought to be applied. Every man may be presumed to know what is material to the risk which is run in a voyage. Yet even there it has been held, that a man is not bound to communicate every thing, though it might be better that the underwriters should know many things which are not communicated. In *Hayward v. Rodgers (a)*, Lord Ellenborough says, "It might be a much better thing if the whole history of a vessel were told, where she was built, and what was her last voyage, &c. &c., *all of which the underwriters might possibly be the better for knowing*, still, unless some of these particulars are *fraudulently* suppressed, and unless it is perfectly clear that the party concealing them, though they turned out to be material, *knew* that they were material at the time when he concealed them, the policy is not vitiated." But with respect to life insurances, it would be impossible for the business to be carried on, if the assured must be taken in all cases to warrant that he has communicated every thing that has come to his knowledge, which may be thought material by others.

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(a) 4 East, 590; 1 Smith, 289.

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Lord TENTERDEN, C. J.—At the trial before me, after reading the depositions of many foreigners, and amongst others, those of the two physicians who had granted the medical certificate, there was read the deposition of a physician of the name of *Stark*; he had spoken of the state of the organs of speech of this prince as being paralytic, and he said “ I should have mentioned this in the certificate.” After *Stark's* deposition had been read, Mr. *Green*, a surgeon in London, was examined on behalf of the plaintiff, and he said, “ I should think it right to mention, in certifying the state of a patient's health, frequent catarrh; so also controlled(*a*) state of intellect. I should have thought it right to disclose the state of intellect.” Upon that, according to my recollection, I said to Mr. *Brougham*, “ Then surely there is an end of the case;” but that if he thought not, the case might still go on further, and then I told him that if the case did go on further, I should think it necessary to direct the jury in a certain way, and said that I should tell the jury “ *that if any fact in their opinion material to the information of the office respecting the health of the party, known to the party certifying, had not been communicated, the policy was void*” (*b*). The only question now before us upon the present motion is, whether such a direction would have been correct or not. If it would not have been correct, there ought to be a rule to shew cause, that we may see further what there is in the case, and whether upon other grounds there ought to be a new trial; but at present we have only to consider whether such a direction would have been correct or not. At the time of the trial, I had in my recollection, but not very accurately, some case that I knew some years ago. I had in my recollection also the case of *Morrison v. Muspratt* (*c*), which had been tried before me at Lincoln, and in which a new trial was directed upon the ground of my not having done what upon this occasion I thought it right to do. In that case, it appears by the report, that I directed the jury to say whether any misrepresentation had been made to the defendant, but I did not

(*a*) *Post* 57, (*a*). (*b*) See the minute, *ante*, 47. (*c*) 4 Bingham, 60.

expressly call on them to consider whether the illness of the party insured in January and February 1823, and the attendance of Mr. *Bland*, the medical man, ought to have been communicated before the insurance was effected. The Court of Common Pleas thought that I ought to have so directed the jury, and therefore they granted a new trial; and the Lord Chief Justice says, "Whether or not it was material for the defendant to have been made acquainted with the fact which has been withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material, because all insurance offices are desirous to consult with the medical man who has been the last in the attendance on the life insured. I think, therefore, there should be a new trial on payment of costs, as the attendance of *Bland*, or Mr. *Elgie*, was not disclosed to the insurers." In this opinion, the other Judges of the Court concurred, and the rule was made absolute. Now in this case, the insurance was upon the life of a foreigner. There had been a previous assurance by another office in London, the Union, who had an agent resident abroad, and had effected, through the intervention of that agent, many insurances on the lives of persons abroad. There was a desire to insure a further sum upon the life of this prince, altogether, I believe, amounting to a very large sum (a). The Union office had gone as far as it was disposed to do, and therefore the secretary of that office handed to the secretary of the defendant's office, the certificate which had come from their own agent abroad, together with the medical certificate that had been sent by the party who was desirous of effecting the insurance. Now the certificate of the agent is not one of the certificates given by the assured, but it is given in answer to an inquiry which the assurers have thought fit to make; still, if that did distinctly disclose the fact of the state of his intellect which is not mentioned in the plaintiff's certificates, it would be a question whether it is necessary for the insured to bring to the notice of the (a) £16,000; being the amount due, which Duke Frederick had of a personal debt of the preceding engaged to pay in five years.

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insurers, a fact of which they had a distinct knowledge in another way (a). But upon referring to the evidence, *Bernhardi* does by no means state that circumstance; he mentions it as a sort of rumour. Then Mr. *Brougham* contends that they are not bound to do more than answer the questions, unless there be a fraudulent concealment. This cannot be considered as a fraudulent concealment, at least my direction to the jury did not put it upon the ground of a fraudulent concealment, but merely upon the omission to mention. If, however, you look at the question, it seems to me that it is all but a specific question. A great many inquiries are made as to the state of the prince when he was last seen. One of the questions is, whether the party has attended him in a medical capacity, and on what account? As to which, one of the physicians says, "As his prime physician, I have the duty of visiting his Highness every day. In the month of April, 1823, he was ill of a slime fever (b), but since then, he is quite as well as he was before." Then the next question mentions several different complaints by name, to which there is an answer, which mentions that he has a dimness of sight upon his left eye; and one of them says, that "since 1819 he is hindered in the faculty of speaking, in consequence of a sustained inflammation in his chest." The other says, "he is not afflicted with any such diseases, but has, since 1809, a dimness of sight (amaurosis) upon his left eye. He is, since 1819, also hindered (c) in the faculty of speaking, which has been occasioned by an inflammation in the chest." The interpreter who was examined, said that it meant that he had an impediment in his speech. The next question is put, "Do you believe he is now quite free from any disease, or symptoms of disease, and in perfect health?" and one of them says that, "with the exception of those just mentioned complaints, I consider his Highness to be at this moment quite free from all other diseases, as also free from all and every symptoms of disease, and can

(a) *Vide* 6 Taunt. 187.

(c) *Sed vide ante*, 45, (g).

(b) *Ante*, 45, (d).

consequently call the state of his health perfectly good." Another says, "In this present moment, there is not to be perceived neither an illness, and he consequently can be called to be in perfect health." "Are his habits sober and temperate, or otherwise?" "His habits are sober and regular in the highest degree, and he follows rigidly his medical advice." "Are you acquainted with any circumstances having a tendency to the shortening of his life, or which can make an insurance upon his life more than usually hazardous?" "Such circumstances I do not know as far as human knowledge may go (a), and such apprehension may be of less value in the person of his Highness than of any other person, considering the great attention to preserve his health." Another says, "The Duke is in good health, and it is done every thing to preserve the good state of his health, and it is consequently to be expected that no circumstance will occur, which might endanger his life, or which would make an insurance more than commonly dangerous." The office is not content with these inquiries, but they put this general question, which seems to me a question calling for an answer stating every fact which any reasonable man might think material. "Are there any other circumstances within your knowledge, which the directors ought to be acquainted with?" One of them says, "Other circumstances by which the life of his Highness could be endangered are utterly unknown to me." The other answers, "I do not know." These are the certificates of the physicians as to the state of the health of this Prince, who appeared at that time, according to one of the expressions used by some of the medical men that were examined, to have his intellect *controlled* (b); but if you look at the whole of the examination, it is clear that the state of his intellect was such, that he was really quite in the hands of his attendants and the medical men. He hardly appeared on any occasion to have exercised a will of his own; he was quite unable to give an answer to a question; and

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(a) *Ante*, 46, (a).(b) *Vide post*, 57, (a).

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in very few instances indeed he was shewn to be able even to speak (*a*). His valet said that he had been with him for some years, and had never heard him utter a single word. One of the ministers said that he put a question to him upon some state affairs. He gave no answer. He was then requested, if he approved of the measure, to signify his assent by tapping the minister's cheek; and he did so. Now ought, or ought not these circumstances to have been communicated? Can any body doubt, without adverting to other parts of the case, that considering by whom this insurance was effected, and who the persons were that made this communication, these were circumstances material to be disclosed to the office for them to judge of. Upon the authority of *Morrison v. Muspratt* (*b*), as well as of the case mentioned by my brother *Bayley* (*c*), it appears to me that I should not have done wrong in propounding that question to the jury for their consideration, and that if they had found in the affirmative, the policy would have been void.

BAYLEY, J.—Whether the policy be upon ship or upon life, or against fire, I think the underwriter has a right to expect that every thing material, known to the party making the application, shall be communicated to him; and that it is at the peril of the assured, if that communication is not made. And I am of opinion that the question is, whether the thing not communicated is in fact material or not, and not whether it is believed by the person who ought to make the communication to be material or not. The question as to the belief of that party with regard to the materiality of the fact, would certainly in many instances be very difficult to decide; and it would encourage suppression of the communication, if that were the issue upon which the question of risk would ultimately turn. If you make communication essential, where the fact is material, then it becomes the interest of the assured to take care that he

(*a*) *Ante*, 45, (*g*).

(*b*) *Ante*, 50.

(*c*) *Huguenin v. Rayley*, *ante*,

48, (*b*), where it was held, that the question of materiality was for the jury, and not for the Court.

communicates every thing which he knows, and that every person who is acting as agent (*a*) for him shall also make every such communication; but if you are to say that the question is to be, not whether it was material or not, but whether it was believed by the party who ought to have made the communication to be material or not, then the interest of the assured would not go to any thing like the extent to which in the other view of the case it does. There was a case (*b*) in which that was discussed; in which non-communication by a party innocent as to not communicating, was held to vacate the policy, or at least to take away from the assured the right to recover upon the policy on a ship, because one of his agents knew a fact which at the time when the policy was effected, the party ought to have communicated, but did not. The case was this: the ship meets with an accident; the captain afterwards writes to the owner, but conceals the fact that the ship has met with that accident. The owner effects a policy upon the ship, and it afterwards turns out that the accident which had before happened terminates in the destruction of the ship. Then is the underwriter liable or not upon that policy in respect of that loss? The owner of the ship, when he effected that policy, acted *bonâ fide*; he communicated every thing that he himself knew; there was no want of fairness on his part; but the decision of the Court upon that occasion, was this, that inasmuch as that material fact was known to the agent, and as that agent ought to have communicated that fact to his principal, the insurance was effected, under these circumstances, at the peril of the assured, and that the underwriter was not in fact liable. These are the grounds and the authorities for saying that in all cases the point for the consideration of the jury is, not whether the party believed the fact to be material, but whether or not the fact *was* material. Now in this case, all that Lord *Tenterden* proposed to do, was to put it to the jury whether there had been a concealment of any of those facts which were material for the knowledge of the insurer. Mr. *Brougham*

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(a) *Vide ante*, 47, (a).

(b) *Gladstone v. King*, 1 M. & S. 35.

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was not willing that that point should be left to the consideration of the jury, and he declined it, fearing, probably, that he should have a verdict against him, and therefore he withdrew it from the consideration of the jury. I think he was prudent in doing so. I do not think that, under these circumstances, the way in which Lord *Tenterden* was about to put it was in any respect wrong, but, on the contrary, quite right.

LITLEDALE, J.—I am of the same opinion. I think that in all cases of policies, whether they are against fire, or upon ships, or upon lives, the office ought to be acquainted with all the material circumstances of the case, in order that they may form a judgment whether they will effect the insurance or not. Now in cases of policies upon lives, the usual course is for the office to propound a certain number of questions, to which they wish to have answers. These questions are generally applicable to all descriptions of persons. They consider the general state of disease arising among mankind; and they inquire whether such and such circumstances may not exist. But with regard to particular individuals, there may be particular circumstances attending them which it may be very important for the office to know, but which, from the want of previous knowledge, the office cannot embody in the general questions. But if the office had been particularly acquainted with those circumstances applicable to particular individuals, they no doubt would have embodied those particular circumstances in the queries proposed to be answered, either by the party himself, or by medical men, or any other whatever. Here the question is, "Is there any thing concealed in this case which is material, and which if the office had known of, they would have made the subject of particular inquiry." It seems to me that it is not of any consequence whether the person himself, who is to be insured, or whether the medical persons, think it to be material or not, if in point of fact it is material. The jury in this, as in all other occasions, are the party to consider whether a fact in the cause is

important or not. One particular individual may think it important, another may think it not important. It is said that all this would require a great prolixity of statement upon the part of the assured; but I apprehend that is not likely to be the case. There may be a great many trivial circumstances that nobody could think material. If it turns out that there is any thing which the jury do think material, it shews that that ought to have been mentioned; and though it may lead to great prolixity, yet still if the jury are of opinion that it is material, they are the judges by whom the rights of parties are to be bound. The office do not mean to be bound by the answers of particular individuals, if those answers do not come up to the point. The jury have a right to consider whether upon the whole any thing has been withheld which is material. Now in this case, it appears that the person was subject to a local paralysis. It is said that that is not necessary to be communicated, because it does not affect the general health; but if one part of the body be unsound, the same degree of unsoundness may extend to other parts. With regard to the question whether it is necessary or not to state whether the mind (*a*) is affected, perhaps it is not (*b*); but if the affection of the mind be connected with any affection of the body, it is certainly necessary to state it. For these reasons I am of opinion that in this case the direction which my Lord stated he should give to the jury, was perfectly right.

Rule refused (*c*).

(*a*) The answer of Dr. Dori to the 39th interrogatory is translated thus:—"It is *but too* well known that the intellectual faculties of Duke Frederick were in an impaired and *controlled* state;" the original (which has been examined at the Six Clerks' Office,) being "Es ist uns bekannt dass die geistefähigkeiten des herzogs Friedrichs sich in einem *befangenen* und *verschwächten* zustande befanden."

(*b*) Dr. Dori, in his answer to the 41st interrogatory, speaks of the mental infirmities of the Duke as matter of public notoriety, which neither he nor any other party could have thought of concealing. "Der geistigkranke zustand des herzogs Friedrichs ist *welt-bekannt*, u. s. w." This may, perhaps, account for the rate of premium, ante, 45, (*a*).

(*c*) And see *Shirley v. Wilkinson*, Doug. 306, n.

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"Pay to A., or his order, for my use," is a restrictive indorsement; and the indorsee of A. must hold the proceeds to the use of the restricting indorser.

**ASSUMPSIT** for money had and received. Plea, non assumpsit; and issue thereon. Upon the cause being called on for trial before Lord *Tenterden*, C. J., at Guildhall, a verdict was taken for the plaintiff by consent, damages 316*l.* 11*s.* 8*d.*, subject to the opinion of the Court upon the following case.

The plaintiff is a merchant residing at Boston, in the United States of America. The defendants are bankers in London, carrying on business under the firm of *Jones, Loyd, and Co.* In July, 1825, Captain *Attwood*, who commanded a vessel belonging to the plaintiff, took in payment of a cargo of flour, the property of the plaintiff, which he sold at Rio Janeiro, a bill of exchange for 316*l.* 11*s.* 8*d.*, drawn in a set of three by *March, Sealy, Walker, and Co.* of that place, on *March, Sealy, and Co.* of London. This bill was payable to the order of *Hendricks, Weirss, and Co.*, who indorsed it to Captain *Attwood*. The following are copies of the first and third parts of the bill:—

"£2971, (due 28th November.)

"Rio de Janeiro, 12th July, 1825.

"For 316*l.* 11*s.* 8*d.* (1258.)

"At 60 days sight pay this first of exchange, second and third not paid, to the order of Messrs. *Hendricks, Weirss, and Co.*, three thousand one hundred and sixty-four pounds, eleven shillings and eight-pence, value of the same; which place to account, as per advice from

"*March, Sealy, Walker and Co.*"

"Messrs. *March, Sealy, and Co.* London."

This bill was indorsed by the payees to *A. Attwood*.

"Rio de Janeiro, 12th July, 1825.

"For 316*l.* 11*s.* 8*d.*

"At 60 days sight pay this third of exchange, (first and second not paid,) to the order of Messrs. *Hendricks, Weirss,*

and Co., three thousand one hundred and sixty-four pounds, eleven shillings and eight-pence, value of the same; which place to account, as per advice from"

(Addressed and signed as the first.)

This bill was indorsed by the payees to *A. Attwood*, by *Attwood* to the plaintiff, by the plaintiff in the following words, "Pay to *Samuel Williams*, Esq. of London, or his order, for my use," and by *Williams* to the defendants.

*Attwood* sent the first of the set to the correspondent of the plaintiff, Mr. *Samuel Williams* of London, who was an American agent and factor for merchants and planters, carrying on such business to a very great extent, inclosed in the following letter:—

"Sir,—I herewith have the honour to inclose you the first of exchange for 3164*l.* 11*s.* 8*d.* sterling, at 60 days' sight, on Messrs. *March, Sealy*, and Co. in London, in favour of myself, it being the proceeds of a cargo of flour in brig *Swiftsure*, belonging to *Henry Sigourney*, Esq. Boston, America, which you will please to present for acceptance, and keep at the disposal of the second or third."

*Attwood* did not indorse the bill. *Williams* received the letter and the bill on the 26th September, 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the plaintiff, and he having indorsed it as aforesaid, "Pay to *Samuel Williams*, or order, for my use," remitted it to *Williams* in the following letter of the 17th September, 1825:—

"Captain *Amaziah Attwood*, of my brig *Swiftsure*, arrived here yesterday, from Rio Janeiro, whence he sailed about the middle of July. He informs me that he left a letter directed to you, to be forwarded to you by the next English mail, containing the first of *March, Sealy, Walker*, and Co.'s draft on *March, Sealy*, and Co., London, dated 12th of July, at 60 days' sight, for 3164*l.* 11*s.* 8*d.* sterling, in favour of Messrs. *Hendricks, Weirss*, and Co., and by them indorsed to the said *Attwood*. He thinks he did not indorse the draft, and, if received, it can only be accepted. Inclosed you have third bill of the set, indorsed to me by Captain

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*Attwood*, and to yourself by me. I presume that if the other should have been previously received and accepted, a receipt on the one now transmitted would be accepted at maturity. Have the goodness, when you advise the receipt, which I trust will be as soon as possible, of the present, to inform me of the standing of the acceptors.

HENRY SIGOURNEY."

The letter and bill were received by *Williams* on the 21st October, 1825. The defendants had no notice of the before-mentioned letters of Captain *Attwood* and the plaintiff. *Williams* stopped payment on the 24th October aforesaid, and a docket was struck against him on the 25th of the same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time *Williams* received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favour of the plaintiff, to the amount of upwards of 3000*l.*, exclusive of the before-stated bill. On the morning of the 22d October, when the discount hereinafter mentioned was made, the balance in favour of *Williams* with the defendants was 3784*l.* 10*s.* 10*d.* About eleven o'clock on that day *Williams* indorsed the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.*, to the defendants, who were his bankers, and in the habit of discounting for him very largely, and the said bills were *bonâ fide* discounted for him, and credit given to him for the amount, less the discount; and subsequently, namely, about five o'clock in the evening of that day, the defendants paid at the clearing-house *Williams's* acceptances due that day, to the number of thirty-two, and three drafts, amounting to 10,683*l.* 18*s.* 1*d.* The bill in question was honoured at maturity, and the amount received by the defendants on the 28th November, 1825. The question for the opinion of the Court is, whether, under the circumstances, the plaintiff is entitled to recover from the defendants the amount of the bill in question.


*F. Pollock*, for the plaintiff. The bill in question was the property of the plaintiff, and he is entitled to recover the amount of it from the defendants. It was indorsed to *Williams* specially for the plaintiff's use, the intention and effect of which was to restrain the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The oldest case in which a special indorsement of this kind is mentioned, is that of *Snee v. Prescott* (a), where Lord *Hardwicke* said, "Promissory notes and bills of exchange are frequently indorsed in this manner, *Pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie v. The East India Company* (b), *Wilmot, J.*, speaking of the power of an indorser in this respect, said, "To be sure he may give a mere naked authority *to receive it for him*; he may write upon it, *Pray pay the money to my servant for my use*; or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him; and for his own use: in such a case it would be clear that no valuable consideration had been paid him: but at least that intention must appear upon the face of the indorsement." These are authorities for saying that an indorsement, such as that upon the bill in question, restrains the indorsee from transferring the interest in the bill by his subsequent indorsement. A general indorsement makes a bill the legal property of the indorsee, and gives him the *jus disponendi*; but a special indorsement, for the use of the indorser, is notice that the property in the bill is continued in the indorser, and that the indorsee is merely his agent to receive the amount of the bill, without the power of transferring any interest in the bill to a third person. (Here the Court stopped him.)

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*Parke, contra.* The question in this case turns entirely upon the construction of the indorsement on the bill.

(a) 1 Atk. 245, 9.

(b) 2 Burr. 1216; 1 W. Bl. 295.

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That a special indorsement may have the effect of restricting the negotiability of the bill, cannot be denied. The point now for consideration is, whether the indorsement in this case *does* restrict the negotiability of the bill: in other words, whether it constitutes every subsequent indorsee a trustee for the special indorser. Generally speaking, an indorsement conveys to the indorsee all the rights of the indorser, among which is the right of transferring to a third person, by his own indorsement, the interest in the bill. *More v. Manning* (a), *Acheson v. Fountain* (b), *Eddie v. The East India Company* (c). In the latter case *Dennison, J.*, said, "I will not give any opinion whether the indorser might have limited his assignment by some clear, plain, negative words, if, in fact, it had been his intention to limit and restrain it:" and *Wilmot, J.*, said, "I doubt whether he can limit his indorsement by way of assignment, or transfer to another, so as to preclude his assignee from assigning it over as a thing negotiable." Then, even assuming that there may be a "limited indorsement," the question still remains, whether the indorsement in this case contains "clear, plain, negative words," limiting the negotiability of the bill. The indorsement must be construed most strongly against the plaintiff, the party making it. Now this bill is indorsed to *Williams, or his order; primâ facie*, therefore, it is transferable. As between himself and the plaintiff, *Williams* might be bound to hold the proceeds of the bill for the use of the plaintiff; but still he had the legal title, and therefore might transfer the interest in the bill by indorsement. *Cramlington v. Evans* (d) is a decision expressly in point. There the bill was payable to *Price or order, for the use of Calvert*. *Price* indorsed it to *Evans*, after which an extent issued against *Calvert*, and the money due upon it was seized to the use of the king. These facts

(a) 1 Comyns's Rep. 311, 312;  
 and see 4 Vin. Abr. *Blanks*, 7, S. C.

(b) 1 Stra. 557.


(c) 2 Burr. 1216; 1 W. Bla. 295.

(d) 1 Show. 4; and see *Cramlington v. Evans*, in error, Carth.

5; 2 Ventr. 307; Skinner, 264;

Mann. Exch. Pract. 2d ed. 51.


appearing upon the pleadings, two points were made upon demurrer; the one, whether *Calvert* had such an interest in the money as might be extended; the other, whether *Price* had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of *Calvert*: and the Court of King's Bench, and afterwards the Exchequer Chamber, held that *Calvert* had not such an interest as could be extended, and that *Price* had power to indorse the bill, and judgment was given for the plaintiff" (a). In one report of that case (b), Lord *Holt* is represented to have said, "This is a bill which is assignable by *Price*, and when *Price* assigned it he received the money, and that receipt was for the use of *Calvert*; and there *Calvert* hath his action; but we can take notice of none but *Price*; and at this rate the credit of bills of exchange will be spoiled." [*Bayley*, J. In that case the question was not raised, whether *Price*'s indorsement was in violation of his duty to *Calvert*.] If *Calvert*'s consent to the indorsement had been necessary, it must have been stated on the record that such consent had been given; but there is no such averment in the pleadings as set out in one report of the case (c). The words "pay to *Williams*, or his order," clearly imply an authority to *Williams* to indorse the bill; and the subsequent words "to my use" may be construed as instructions from the plaintiff to *Williams*, as his agent, to hold the proceeds of the bill on his account. Any other construction renders the indorsement restrictive; but that cannot be without "clear, plain, negative words" to that effect: and there are no such words in this indorsement. Upon the first construction the indorsement will stand as if the words had been "which place to my account," or "which hold to my use," in which case the defendants would clearly not have been bound to see to the application of the money. [*Bayley*, J. The defendants misapplied the money, having notice of the trust.] The defendants discounted the bill,

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(a) And see Chitty on Bills, 7th ed. 65, 123, (b).

(b) 1 Show. 4.

(c) 2 Vent. 307.

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*bonâ fide*, under circumstances which raised no suspicion that the proceeds would be misapplied. [Bayley, J. That is assuming that the plaintiff intended the bill to be negotiated; but we cannot say that such was his intention: indeed, the probability seems the other way.] The party discounting the bill was not bound to make inquiry as to the application of the money. If the construction contended for on the other side be correct, every subsequent indorsee becomes a trustee for the plaintiff, which would be extremely inconvenient. [Bayley, J. It is not necessary to go that length in the present case. It is enough to say that the first indorsee became a trustee for the plaintiff.] The argument seems to have equal weight if applied to the case of the first indorsee only. Is it possible that the plaintiff can look to two of the parties, namely, the bankrupt and the defendants? The plaintiff knows *Williams*, but the indorsee of *Williams* may be an utter stranger to him. The real question is, what was the intention of the indorser. According to the dictum of Lord Holt in *Evans v. Cramlington (a)*, when *Williams* indorsed the bill for value to the defendants, he became trustee for the plaintiff. The bill was not then due. He could not make the defendants trustees for the plaintiff. If there were any fraud or collusion between the parties, the case might be different, as in *Treuttel v. Barandon (b)*. [Bayley, J. That case comes pretty near to the present in principle. Here the money has been misapplied, and the defendants were parties to its misapplication.] They merely applied the money generally ac-

(a) 1 Show. 4.

(b) 8 Taunt. 100; 1 Moore, 543; where it was held, that an agent, who has received from his principal bills indorsed "on account" of such principal, by which means their negotiability is restrained, cannot deposit them with his bankers as a security for advances;

that the special indorsement is a sufficient notice to the bankers that the bills are not the property of the party from whom they receive them, so as to enable him to pledge them; and that bills so pledged are recoverable from the bankers in trover by the principal.

ording to the directions of *Williams*. They could not know, nor were they bound to inquire, in what particular mode *Williams* was to apply the money to the use of the plaintiff. It cannot be expected that a subsequent *bonâ fide* indorsee shall, before he discounts a bill, inquire into the state of the accounts between the prior parties; and even his doing so could not guard against a misapplication of the money by his indorsee. He is not bound to look dehors the bill.

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Lord TENTERDEN, C. J.—I am of opinion that the plaintiff is entitled to recover. It appears from the report of the case of *Snee v. Prescott* (a), that an indorsement in this form had been occasionally adopted so long back as the year 1743; and it seems to have been the opinion of Lord *Hardwicke* in that case, and of *Wilmot J.*, in the case of *Edie v. The East India Company* (b), that such an indorsement had the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person making the indorsement, and for whose use it is in terms expressed to be made. There is another case, which has not been quoted at the bar, *Ancher and others v. The Bank of England* (c), which is an authority to the same effect. The indorsement there by the payee, though not precisely the same in form as in the present case, was nevertheless the same in effect. It was this:—"The within must be credited to Captain *Mosten Larsen Dahl*, value in account." *Dahl's* indorsement of the bill was forged, and the bill was discounted by the Bank of England. The acceptors having failed before the bill became due, did not pay it, and a person named *Fulberg* paid it for the honour of *Ancher and Co.*, the plaintiffs. *Ancher and Co.* brought an action for money had and received against the Bank of England, contending that the special indorsement of the bill restrained its negotiability. Lord *Mansfield* in the first instance nonsuited the plaintiffs, but upon argu-

(a) 1 Atk. 247.

(c) Dougl. 637, 641.

(b) 2 Burr. 1227; 1 W. Bl. 295.

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ment upon a rule *nisi* for a new trial, he, together with *Willes*, J. and *Ashhurst*, J., was of opinion that the indorsement was restrictive, and that the plaintiffs were entitled to recover: but *Buller*, J., was of the contrary opinion. Lord *Mansfield*, then said, that it all depended upon the question whether the bill continued negotiable or not; and that if they altered their opinion, the case should be mentioned again. The case, however, never was mentioned again; and upon the second trial, Lord *Mansfield* directed the jury to find for the plaintiffs, which they did: and it does not appear that any attempt was ever made to disturb that finding. In that case, therefore, the special indorsement was held to restrain the negotiability of the instrument. It has been argued that the indorsement in the present case, "Pay to *Williams*, or order, for my use," is no more than a direction to *Williams* to apply the proceeds of the bill to the use of the plaintiff. But for such a purpose the words "to my use," were perfectly unnecessary and useless; because it was equally the duty of *Williams*, so soon as he received the proceeds of the bill, to apply them to the use, and carry them to the credit of the plaintiff, whether those words appeared on the face of the indorsement or not. Those words, therefore, can really have no effect at all, unless they have the effect of restraining the negotiability of the bill, or at least of making the first indorsee, (we need not go beyond that, for the defendants were the first indorsers,) if he takes the bill with those words upon it, a trustee for the original indorser, in the same manner as *Williams* is admitted to have taken it. The case of *Evans v. Cramlington* (a), which has been relied on as justifying a different view of the question, does not appear to me, when duly considered, to be sufficient to counteract the authorities to which I have already alluded. In that case the bill was drawn by *Cramlington* upon *Ryder*, payable to *Price*, or order, for the use of *Calvert*. *Ryder* accepted the bill, but did not pay it. *Price* indorsed the bill to *Evans* for value. *Evans* sued *Cramlington* upon the bill.

(a) Carth. 5; 2 Vent. 307; Skinner, 264; 1 Show. 4.

*Cramlington* pleaded that *Calvert*, to whose use the bill was indorsed, was an officer in the Excise, and indebted to the Crown, and that under Exchequer process at the suit of the Crown, the amount of the bill had been extended in his hands. *Evans* demurred to that plea. It seems, therefore, that *Cramlington*, in answer to the claim of *Evans*, the indorsee of the bill, set up what has been sometimes denominated the *jus tertii*; and one of the questions for the opinion of the Court, and the only one upon which they found it necessary to decide, was, whether the bill, being in trust only for the use of *Calvert*, was liable to be seized under the extent against him. The Court were of opinion that it was not liable to be so seized, and the proposition of *Cramlington*, therefore, that the *jus tertii* had intervened, failed, and his defence became entirely nugatory. Now, such an interest would be held to be seizable, but then the law was held to be otherwise (a). That case, therefore, as it seems to me, is not an authority sufficient to counteract the opinions expressed in *Snee v. Prescott* (b), *Edie v. The East India Company* (c), and *Ancher v. The Bank of England* (d), and, consequently, I think the plaintiff in this case is entitled to recover. The utility of indorsements of this nature is by no means trifling; nor are they, in my judgment, inconsistent with the interests and the convenience of commerce. It is true that such an indorsement will not have the effect of preventing the indorsee, under circumstances like the present, from receiving the money from the acceptor when the bill becomes due. If he pays the money, upon receipt of it, to his principal,

(a) See the pleadings at length, and the arguments in the Exchequer Chamber upon the writ of error, 2 Vent. 296, 307. It appears to have been expressly pleaded that the consideration of the bill was crown money delivered by *Calvert* to *Cramlington* the drawer. That case was decided before the rule of the Court of Exchequer of 31 May, 1712, for inserting in writs

of extent an inquiry as to goods, chattels, debts, and credits, held in trust for, or to the use of, the crown debtor. And see *Bell v. Chaplain*, Hardres, 321; *Smith v. Kendal*, 1 Esp. N.P.C. 231; 6 T.R. 123; *Richardson, ex parte*, 14 Ves. 187.

(b) Atk. 247.

(c) 2 Burr. 1216; 1 W. Bla. 295.

(d) Dougl. 637.

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all will be well, whether he receives the money from the acceptor, or from a subsequent indorsee; but in the latter case, the subsequent indorsee must look to him for the application of it. And this will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it for his own debt, to relieve himself from embarrassment at the expense of his correspondent. I cannot see that the interests of commerce will be in any degree prejudiced by our holding that an indorsement like this is restrictive. On the contrary, I think, the decision will promote the interests of commerce. It has been urged, that it cannot be expected that bankers or others, when applied to to discount bills such as this, should look into the accounts between the restricted indorsee, or agent, and his indorser or principal. I admit it cannot be expected that they should; but still, if they take such a bill, they must take it at their peril, and must be bound by the state of the accounts between those parties.

BAYLEY, J.—The indorsement here is “Pay to *Williams* or order for my use,” and the question is whether the words “for my use” have or have not any effect with reference to the bill itself. The person who remits a bill may give private directions to his correspondent in the letter inclosing the bill; and if he means to give private directions only, he will confine himself to the letter. But where he introduces the words “to my use” upon the back of the bill itself, he apprises all the world that he, the indorser, has not given to the indorsee a general and unlimited authority to possess the bill and to apply it to his own purposes, but that he restricts the application of it to the use of himself, the indorser, alone. Mr. *Parke* has suggested that the most convenient construction to be put upon these words is to consider them as a direction to *Williams* only to apply the money to the use of the indorser, and not as intended to put indorsers on their guard. But I consider the most convenient construction to be that which will most effectually protect the person who appears, by the form of indorsement he has adopted, to have felt that he required pro-

tection. It is said, why introduce the words "or order"? It may be that the purposes of the plaintiff required that the bill should be discounted; but before any person could honestly and *bonâ fide* take that bill and advance money upon it, he ought, seeing the words "to my use" on the back of the bill, to have satisfied himself, from the correspondence and the state of the accounts between the parties, whether the holder was negotiating the bill for the benefit of the indorser, or for his own purposes: and if such a person does advance money upon a bill so indorsed without making such inquiry, he must advance it at his peril. In the present case the defendants advanced money upon the bill without making any inquiry, and applied the whole of that money to the use of *Williams*. They discounted the bill on the 22d of October, the day after *Williams* had received it. *Williams* had then upwards of 3000*l.* in their hands. They discounted this and other bills to the amount of 7000*l.*, and in the course of the day they applied all the money produced by this and the other bills to the use of *Williams*, so that at the close of that day *Williams* had remaining in their hands a sum of 182*l.* only. With respect to the case of *Evans v. Cramlington* (a) it is sufficient to observe that it came before the Court on demurrer, and that it involved no question as to the misapplication of the money which had been received by means of that bill. In this case there has been a misapplication of the money, to which the defendants were parties. That appears to me a sufficient distinction between that case and the present. For these reasons I am of opinion that the plaintiff in this case, by making the special indorsement, effectually gave himself that protection which he clearly intended to obtain, and is, therefore, entitled to retain the verdict which has been found in his favour.

LITTLEDALE, J. was in the Bail Court.

Postea to the plaintiff (b).

(a) Carth. 5; 2 Vent. 307; Skinn. 264; 1 Show. 4.

(b) The parties had liberty to turn the case into a special ver-

dict, and a writ of error having been brought, judgment of this Court was affirmed in the Exchequer Chamber, 3 Y. and J. 220.

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ALLEN and another, Assignees of SCOTT, a Bankrupt,  
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A deed, in which several persons combine to effect a common purpose, requires only a single stamp.

Therefore a power of attorney, where- by the several members of a mutual insurance club authorized the subscription of policies in their respective names, requires only one stamp; there being a community of purpose though (from each insurer being excluded from the policy upon his own ship) not an entire community of interest.

**ASSUMPSIT** upon a policy of insurance on the ship *Benson*. Plea, non assumpsit; and issue thereon. At the trial before *Bayley, J.*, at the last summer assizes at Newcastle upon Tyne, the following facts appeared. The bankrupt and the defendant were members of a mutual Insurance Company at Shields, in which each member was to have a vessel insured. A power of attorney was executed by the members to a committee authorizing them to subscribe policies on the ships admitted into the club; and the course was, for the committee to subscribe the names of all the members, with the exception of the name of the party insured. The power of attorney had only the common deed stamp of 1*l.* 15*s.* On the part of the defendant it was contended, that a separate stamp should have been affixed to this instrument in respect of each of the insuring parties. The learned Judge overruled the objection, giving the defendant leave to move. A verdict having been found for the plaintiff,

*C. Cresswell* now moved to enter a nonsuit according to the liberty reserved. The stamp was insufficient, there being nothing to direct it to this particular defendant. The general rule laid down by *Mr. Phillipp*<sup>(a)</sup>, is not disputed. He says, "The distinction established is this, that if the interest of the parties relate to one thing which is the subject-matter of the instrument, or, in other words, if the instrument affect the separate interest of several, and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters there ought to be a separate stamp for each party against whom, or in

(a) 1 Phill. Evid. 513, 5th edit. And see *Starkie*, Law of Evidence, part iv. 1368, 1375, 1376.

whose favour this instrument is offered in evidence." Thus a contract between several persons to raise money to make a dock was held to require but one stamp. *Davis v. Williams* (a). Here there is not a community of interest, inasmuch as each member as to his own ship is not an insurer. If two persons mutually insured one another, the instrument would require separate stamps. [*Bayley, J.* Here there is a common purpose.] There is however no community of interest. [*Bayley, J.* There is a common purpose that all should be insured, though there is no community of interest in each particular insurance.]

Lord TENTERDEN, C. J.—There was most clearly a community of purpose, and to most purposes a community of interest.

Rule refused (b).

(a) 13 East, 232.

(b) And see *Goodson v. Forbes*, 6 Taunt. 171, 1 Marsh. 525.

CHURCHILL and another, Assignees of the Estate and Effects of THOMAS THOMAS, a Bankrupt, v. DAY, Esq.

ASSUMPSIT for work and labour, upon the money counts, and upon an account stated; the first seven counts laying the promises to *Thomas* before his bankruptcy, the last three to the assignees. Plea, non assumpsit, under which the defendant paid into Court 420*l.* 2*s.* 1*d.* upon the seventh and tenth counts, which alleged an account stated with the bankrupt and the assignees respectively. At the trial before Lord Tenterden, C. J., at the last sittings at Guildhall (c), it appeared that the bankrupt had contracted

(c) Counsel for the plaintiffs, *Brougham, Reader, and F. Kelly*; for the defendant, *Sir J. Scarlett and Deacon*.

account stated, and money is paid into Court on the latter count only, he is not entitled to a verdict upon proof of work done, though no evidence be given of an account having been stated, and the money paid into Court greatly exceeds the sum due for work, and would be covered by a demand which the plaintiff has against the defendant by virtue of a covenant in a deed.

A. covenants by deed to do work for B., the remuneration to be fixed by C. C. fraudulently awards that nothing is due. A. cannot sue B. in assumpsit.

Where plaintiff declares for work done and upon an

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with the defendant, by an instrument under seal, to perform certain work at certain prices, with a proviso that any extra work should be ascertained and estimated by Bull, a surveyor, whose decision was to be final. Bull having, as it was alleged, made a fraudulent award, and thereby deprived the plaintiff and his assignees of their remedy under the covenant, it was contended that the amount of such extra work being 106/., and also the sum of 9l. 2s. due for work done under a separate parol agreement, were recoverable in the present action, and that these claims were not extinguished by the sum paid into Court, inasmuch as that was applicable to a larger debt due from the defendant under the covenant. The learned Judge, however, was of opinion that the defendant had a right to apply the payment to the debt recoverable in that action, and as that debt was covered by the money paid into Court, he directed a nonsuit, which

*Brougham* now moved to set aside. In *Cooke v. Jennings* (a), covenant was brought upon a charter-party, in which the defendant had covenanted to pay so much for freight for "goods delivered at Liverpool." The declaration stated that after part of the voyage had been performed, the vessel was lost, and the goods landed elsewhere, and that they were accepted and sold by the defendant, who claimed freight *pro ratâ itineris*. It was held upon demurrer, that the plaintiff could not recover, because the event, upon the happening of which the money was to become due, had not taken place. Lord *Kenyon*, however, observes, "It is not necessary to decide whether or not the plaintiff might have brought an action of *assumpsit*." The same case establishes that whether an instrument be under seal or not, if the party declare upon the special contract, he must aver the performance of conditions precedent. But there are a great variety of decisions shewing that where services are performed under a special contract, but not according to its precise terms, no default or breach

(a) 7 T. R. 381.

being committed by either party, that implied assumpsit upon a *quantum meruit* arises. Such was the case in *Christy v. Row* (a), in which the above case of *Cooke v. Jennings* was cited, and where it was held, that a ship being freighted to *H.* and prevented by restraint of princes from arriving, and the consignees directing the master to deliver the cargo at *G.* and accepting it there, he may maintain assumpsit upon an implied contract to pay freight *pro ratâ itineris*. The numerous class of cases where assumpsit upon a *quantum meruit* has been held maintainable on a deviation from a special contract proceed upon the same principle, viz. that one party has performed services by which the other is benefited, that no action lies upon the special contract, and that if the *quantum meruit* be not maintainable, the party is without remedy. Here the plaintiffs proved a cause of action upon the count for work and labour, and upon that count no money was paid into Court, and there was no evidence of any account stated, though the money was paid in as upon an account stated. [*Bayley, J.* It was not proved, because it was admitted (b).] If any account were stated, in which 420*l.* 2*s.* 1*d.* was admitted

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(a) 1 Taunt. 300.

(b) The payment of money into Court admits every fact, the proof of which would have been necessary to entitle the plaintiff to a verdict for the sum paid in; and, therefore, even upon this record, the defendant must be taken to have admitted an accounting which left him liable to the payment of 420*l.* 2*s.* 1*d.* But the payment must not be considered as an admission of an account in which that particular balance was found; for if the plaintiff were to prove an account actually stated, or an acknowledgment, which is tantamount to an account stated, for a larger sum, it would be competent to the defendant to reduce that large demand so as to meet the sum paid into Court, by evidence

of payment, satisfaction, or release, &c. of the difference. Where money is paid into Court upon a count on a special contract, or generally upon a declaration containing a count upon a special contract, the principle is the same, though the effect is rather different. If I declare upon a bill of exchange for 100*l.*, and defendant brings into Court only 60*l.*, he not only admits his liability to pay 60*l.* on account of that bill, but he also admits that he is *primâ facie* liable to pay the other 40*l.*; because under the general issue alone, I could not have obtained a verdict for the 60*l.* without giving evidence which would have shewn me entitled *primâ facie* to the whole 100*l.* But it is competent to the defendant to rebut this *primâ facie*

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to be due, that account must have applied to the money due by the covenant, and could not have been confined to the simple contract debt for work and labour, which amounted only to 9*l.* 7*s.*; and *Foster v. Allanson* (a) shews that in such a case the plaintiff is entitled to recover.

LORD TENTERDEN, C.J.—Fraud in the award would not authorize the plaintiff to reject the deed, and recover as upon a simple contract. He must go into a court of equity (b) to set the award aside. At the trial I thought that in this action the parties could not recover money due to the bankrupt by covenant. The 106*l.* was claimed as extras. But more was paid into Court upon the account stated than was sufficient to cover that sum. The money paid into Court must be applied to the only sum recoverable on the counts on which it is paid in. It would be dangerous to say that if money is paid into Court upon one count, and in the declaration another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated.

#### Rule refused (c).

liability by any evidence which does not go to shew that at the time of the payment of the money into Court he did not owe 60*l.* or at least some sum of money, upon the bill. Thus he may shew that to the extent of 40*l.* or to any extent less than the whole amount of the bill, I held it as his trustee; or that the consideration was partially void; or he may protect himself by matter *ex post facto*, as payment, satisfaction, release, &c. And see *Godsall v. Boldero*, 9 East, 72, 79; *Bell v. Ansley*, 16 East, 146; *Blackburn v. Scholes*, 2 Campb. 341.

(a) 2 T. R. 479; and see *Rackstraw v. Imber*, Holt, N. P. C. 368; ante, vol. i. 238, (b).

(b) This Court had no statutory jurisdiction over the award, the submission not being made, and as it

would seem, not being capable of being made, a rule of Court. This was merely an appraisement. The words of 9 & 10 W. 3, c. 15, s. 1, are, "It shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's Courts of Record which the parties shall choose." And see *Leeds v. Burrows*, 12 East, 1. It does not, however, follow that an action might not be maintainable upon such an appraisement as an award. See *Perkins v. Potts*, 2 Chitt. Rep. 399.

(c) The nonsuit seems to be sustainable also upon the ground that there was a contract under seal with respect to the extra work.

## The KING v. JAMES NUNN.

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THIS defendant, a prisoner, had been convicted before two justices of the borough of Harwich, in the county of Essex, on the information of *E. J. Jennings*, an officer of customs, of having, within six months then last past, to wit, on the 18th September, 1828, he being a subject of his Majesty, and liable to be stopped, arrested, and detained for the offence thereafter mentioned, *been found on the high seas on board a certain vessel liable to forfeiture, under the provisions of the statute 6 Geo. 4, c. 108; for that the said vessel not being square rigged, and belonging to subjects of his Majesty, on the day and year aforesaid, was found on the high seas aforesaid, elsewhere than in any part of the British or Irish Channel, within 100 leagues of a certain part of the coast of the county of Essex, having on board divers, to wit, 4300 pounds weight of tobacco, contrary to the form of the statute in that case made and provided; and the said James Nunn having been found on board the said vessel at the time of her becoming and being so subject and liable to forfeiture; and the said James Nunn having been on the day and year aforesaid, for the offence aforesaid, stopped, arrested, and detained by W. P., an officer of customs, and by him taken and brought into a certain place on land in the United Kingdom, to wit, into the borough of Harwich, in the county of Essex, the said justices had adjudged that the said James Nunn had forfeited for his said offence 100*l.*; and that sum not having been paid, the said justices required W. P. and W. B. to take and convey the said James Nunn to the convict gaol at Springfield, in the county of Essex, and to deliver him into the custody of the gaoler of that gaol, and required the said gaoler to take the said James Nunn into his custody, and safely keep him until he should pay the said 100*l.**

A vessel liable to forfeiture under 6 G. 4, c. 108, s. 3, was seized while entering the harbour of A., but within the jurisdiction of the justices of B. A person liable to apprehension under s. 49, being found on board, was arrested there, and carried to A., and convicted by two justices of that place under s. 74:—Held, first, that said person was, in the absence of evidence as to the time of his going on board, properly convicted, as having been on board on the high seas; and secondly, that the justices of A. had jurisdiction.

*Platt*, on a former day, had obtained a rule nisi for a writ of *habeas corpus* to issue, directed to the gaoler of the



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convict gaol at Springfield, in the county of Essex, or his deputy, commanding him to bring up the body of the prisoner, *James Nunn*. The rule was granted upon affidavits stating, that at the time when the prisoner was stopped, arrested, and detained, as mentioned in the commitment, he was not found upon the high seas, as alleged in the commitment, but was then on board a certain vessel called the *Mary and Eliza*, being the vessel referred to in the commitment; which vessel was then proceeding on her voyage, and sailing on that part of the coast of Suffolk which lies next the boundaries of the parish of Walton, in the county of Suffolk, but not at a greater distance than 300 yards from the land on the said coast, and in the river *Orwell*, commonly called the Ipswich Water; that the place where he was so stopped, arrested, and detained, was opposite to the south east side of the town of Harwich, in the county of Essex, where the river is about a mile wide; that the town of Harwich and part of the coast of Essex may be very distinctly seen from the said place, and also that part of the coast of Suffolk which is nearest to the said place; that the civil and criminal jurisdiction of the borough of Ipswich extended from the town of Ipswich down the said river, below Landguard Fort, and that persons were tried at the sessions for the borough of Ipswich, for offences committed upon the said river, at least seven miles distant from the parochial limits of the said borough; that the jurisdiction of the justices of the borough of Ipswich over the said place was public and notorious; and that the whole of the river *Orwell* which flows from Landguard Fort is within the jurisdiction of the borough of Ipswich. The depositions taken before the justices, which had been returned into this Court by *certiorari*, stated, that *W. P.*, an officer of customs, being on watch very early in the morning of the 18th September, 1828, saw the vessel described in the commitment entering the harbour of Harwich, about two miles from the town of Harwich; that he boarded her, and found the prisoner on board.

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*Tindal, S. G., and Shepherd*, now shewed cause. The grounds on which this rule was obtained appear to be two: first, that there was no evidence to shew that the prisoner was on board the vessel *on the high seas*, and, therefore, that he had committed any offence within the words of the statute; and secondly, that assuming such evidence to exist, still the magistrates of the borough of Ipswich, or of the county of Suffolk, were the persons properly having jurisdiction, and not the magistrates of the borough of Harwich. Neither of these grounds can be supported. As to the first point, the information charges that the prisoner was found on the high seas on board a vessel liable to forfeiture, and the commitment states that the justices convicted him of the offence charged by the information. The justices, therefore, have adjudged that the prisoner was found on board the vessel on the high seas, and their judgment is as conclusive of that fact, as it is of the fact, not objected to, that the vessel was liable to forfeiture. But without relying upon the argument that the adjudication of the justices is conclusive upon this point, the depositions furnish a sufficient answer to the objection. It appears from them that the officer of the customs, at a very early hour in the morning, perceived the vessel making for Harwich harbour; that when she had entered the harbour he boarded her, and that he then found the prisoner on board. So that the vessel, when first discovered, was clearly on the high seas, with the prisoner on board; and if so, it is wholly immaterial where she was when she was actually detained. As to the second point, it is unnecessary to consider whether the justices for the county of Suffolk, or for the borough of Ipswich, had jurisdiction over the case or not, as it is perfectly clear that the justices of the borough of Harwich had jurisdiction under the statute 6 Geo. 4, c. 108, s. 74, (a) that being the first place on land into which the vessel was carried.

(a) Which enacts, that in case any other act relating to the revenue of customs, or any penalty or forfeiture shall be incurred upon any offence shall be committed upon the high seas against that or

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*Platt, contra.* The place in which the prisoner was arrested and detained was within the jurisdiction both of

the high seas for any breach of such act, such offence shall, for the purposes of prosecution, be deemed and taken to have been committed, and such penalty and forfeiture to have been incurred, at the place on land in the United Kingdom, or the Isle of Man, into which the person committing such offence, or incurring such penalty or forfeiture, shall be taken, brought, or carried; and in case such place on land is situate within any city, borough, &c., as well any justices of the peace for such city, borough, &c., as any justices of the peace for the county within which such city, borough, &c., is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding. Provided always, that all offences against that or any other act relating to the revenue of customs committed in any city, borough, &c., shall be deemed and taken to have been committed in the county within which such city, borough, &c., is situate, and as well any justices of such city, borough, &c., as any justices of the county in which such city, borough, &c., is situate, shall have jurisdiction to hear and determine the same.

The other clauses of the same act of parliament, bearing upon the principal case, are these:—

Sect. 3 enacts, that if any vessel or boat, not being square-rigged, belonging in the whole or in part to his Majesty's subjects, or whereof one half of the persons on board,

or discovered to have been on board, the said vessel or boat, shall be subjects of his Majesty, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board tobacco, &c., then and in every such case the said tobacco, &c., and also the vessel or boat, with all guns, &c., shall be forfeited.

Sect. 49 enacts, that every person, being a subject of his Majesty, who shall be found, or be discovered to have been, on board any vessel or boat liable to forfeiture under that or any other act relating to the revenue of customs, for being found within four or eight leagues of the coast of the United Kingdom, as aforesaid, or for being found, or discovered to have been, within any of the distances or places in that act mentioned, from or in the United Kingdom, or from or in the Isle of Man, having on board, or having had on board, or conveying, or having conveyed, in any manner, such goods or other things as subject such vessel or boat to forfeiture, shall forfeit 100*l.*; and it shall be lawful for any officer of the army, navy, or marines, being duly authorized, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, to stop, arrest, and detain every such person, and to carry and convey such person before two or

the justices for the borough of Ipswich, and of the justices for the county of Suffolk; and having been taken within one jurisdiction, the officer had no authority to carry him into another, *Ex parte Kite* (a); which is decisive upon that point. Then upon the other point, it is clear from the third (b), forty-ninth (b), and seventy-fourth (c) sections of the 6 Geo. 4, c. 108, that in order to give any justices jurisdiction, the statute requires the offence to have been committed on the high seas; and therefore, unless the committing magistrates in this case had evidence before them that the prisoner was on board the vessel on the high seas, they had no jurisdiction. Now there was no evidence of that kind; there was nothing to shew that the prisoner had committed any offence on the high seas. The only evidence upon that subject was, that the prisoner was on board the vessel when she was seized; but the vessel was not then on the high seas: on the contrary, she was in Harwich harbour, a place within the jurisdiction of other magistrates, and into which she was not carried by the seizing officer, but into which she proceeded in the course of her voyage. For all that appears upon the face of the

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more justices of the peace in the United Kingdom, &c., to be dealt with as thereafter directed. Provided always, that any such person proving, to the satisfaction of such justices, that he was only a passenger in such vessel or boat, and had no interest whatever either in the vessel or boat, or in the cargo on board the same, shall be forthwith discharged by such justices.

Sect. 80 enacts, that it shall be lawful for any two or more justices of the peace before whom any person liable to be arrested and detained, and who shall have been arrested and detained for being found, or discovered to have been, on board any vessel or boat liable

to forfeiture under that or any act relating to the revenue of customs, &c., shall be carried, on the confession of such person of such offence, or on proof thereof upon the oath of one or more credible witness, to convict such person; and every such person so convicted shall immediately pay into the hands of such justices the penalty of 100*l.*, or, in default thereof, the said justices shall commit such person to any gaol or prison, there to remain until such penalty is paid.

(a) 2 D. & R. 212; 1 B. & C. 101.

(b) Which see set out *ante*, 78, n.

(c) *Ante*, 77, (a).

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depositions, the prisoner may have been on shore when the vessel was first discovered by the officer, and may have gone on board after she had left the high seas, and entered Harwich harbour. The conviction assumes, that because the prisoner was on board the vessel when she was seized in the harbour, he must also have been on board her when she was first discovered on the high seas. There is nothing to warrant such an assumption in point of fact, and nothing can be assumed in point of law, to give operation to a penal statute, or to clothe a magistrate with criminal jurisdiction (a).

Lord TENTERDEN, C. J.—Two objections have been taken to this conviction; the first, that the prisoner was not found on board the vessel on the high seas; and therefore had committed no offence; the second, that his offence, if any, was committed within the jurisdiction of the magistrates of Suffolk or of Ipswich, and not within the jurisdiction of the magistrates of Harwich. It has been contended, that, although the vessel was found on the high seas, the prisoner was not, and that he may have gone on board her after she had left the high seas. If the fact was so, the prisoner might have proved it; and if he had, he would have given a good answer to the information, because he would have disproved the allegation that he was found on board the vessel on the high seas. But the prisoner not having proved that fact, we cannot assume it. Then it is said, that if it is now made to appear before us that the offence was committed, not on the high seas, but in the body of a county, although that would have been good matter of defence to the information, still, as the fact of the offence being committed on the high seas is necessary to give jurisdiction to the magistrates, we ought to inquire into it, notwithstanding the adjudication of the magistrates that the prisoner was found on board the vessel on the high seas (a). I have great doubts whether that doctrine can be maintained; and whether it is competent for the prisoner

(a) See *Rex v. All Saints*, ante, i. 668; *Rex v. Gilkes*, ante, ii. 454.

to set up that as an objection to the conviction now, which he might have set up originally as an answer to the information upon which the conviction was founded. It is, however, unnecessary to express any decided opinion upon that question now, because the whole matter is before us, and looking at the whole matter, it is perfectly plain to my mind, that the offence in this case was committed on the high seas. It appears from the depositions taken before the magistrates, that the officer being upon the watch at a very early hour in the morning, discovered the vessel coming into Harwich harbour, which must mean, coming from sea; consequently the vessel must have been at sea: and if the prisoner was on board the vessel at sea, he was guilty of the offence of which he has been convicted. The other point depends upon the application of the seventy-fourth section of the statute to this case. It is thereby enacted, that if any offence shall be committed upon the high seas, such offence shall, for the purposes of prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the person committing such offence shall be taken, brought, or carried. Now in this case the prisoner was taken, brought, and carried into the borough of Harwich; so that if the offence was committed upon the high seas, which, upon the grounds already stated, I think it clearly was, the magistrates of Harwich had jurisdiction to convict him, and the objection as to the want of jurisdiction in the convicting magistrates falls to the ground. The case cited of *Ex parte Kite* (a) is entirely different from the present. The conviction in that case stated that the prisoners had been found on board a boat in the harbour of Folkstone, not that they had been found on the high seas, or that they had committed any offence there.

BAYLEY, J.—The third section of the act of parliament renders any vessel discovered to have been at sea with

(a) 2 D. & R. 212; 1 B. & C. 101.

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tobacco on board, under the circumstances therein mentioned, liable to forfeiture; and the eightieth section renders any person discovered to have been on board such vessel liable to be convicted. It is contended that the prisoner in this case was not discovered to have been on board the vessel at sea, but that he was only found on board within the limits of the county of Suffolk, or of the borough of Ipswich; and that the seventy-fourth section ought to be construed as giving jurisdiction to the magistrates of that place only, in which the offender is arrested and detained. But that section gives jurisdiction to the magistrates of the place into which the offender shall be *taken, brought, or carried*; therefore, if the prisoner was *taken* on board the vessel within the limits of the borough of Ipswich, and was *carried* in the vessel out of those limits and into the limits of the borough of Harwich, it is clear that by the words of the act the magistrates of Harwich had jurisdiction to try and convict him. In *Ex parte Kite (a)*, the facts were different: there the prisoners were taken on board a boat in Folkstone harbour, and were carried first to Folkstone, and afterwards from Folkstone to Dover.

LITLEDALE, J.—In order to convict the prisoner of the offence charged against him, it was necessary to prove two things: first, that the vessel was on the high seas, and secondly, that he was on board the vessel on the high seas. It seems to me that both those things were proved. It is perfectly clear that the vessel, when first discovered, was at sea, within the limits mentioned in the act of parliament, and I think there was reasonable evidence that the prisoner was *then* on board. It has been argued that the prisoner was not seen on board until the vessel had got into the harbour, and that he may have gone on board while she was there, and after she had left the high seas. If that had been proved before the magistrates, it would have been an answer to the charge, and the prisoner could not have been

(a) 2 D. & R. 212; 1 B. & C. 101.

convicted; but no proof of that kind was adduced; therefore, I think there was evidence upon which the magistrates were justified in finding that the prisoner had been on board the vessel while she was on the high seas. Then the only question is, whether the convicting justices had jurisdiction. It seems to me that they had; because by the act of parliament, the justices of the place into which the person committing the offence is carried, have jurisdiction to try it. A vessel on her way up a river, may pass through several jurisdictions; but the justices of the place on land into which the offender is first carried, have jurisdiction to try and convict him: and in the present case that place was Harwich.

PARKE, J.—I am also of opinion that the magistrates of Harwich had jurisdiction in this case. That question depends upon the construction of the seventy-fourth section of the statute. In order to give the magistrates jurisdiction, two things are necessary; first, that the offence shall have been committed on the high seas, and secondly, that the convicting magistrates shall be magistrates of the place on land into which the person who has committed the offence is carried. Now, first, there was abundant evidence for the magistrates to find that the prisoner was on board the vessel on the high seas. Secondly, though it happened that in the course of conveying the vessel from the place where the prisoner was arrested, (and the place where he was arrested is wholly immaterial,) he passed over a portion of land covered with water, which was within another jurisdiction, still it is plain that Harwich was the first place on land into which he was carried, and that the magistrates who convicted him were magistrates having jurisdiction at that place. It follows that they had jurisdiction over the offence, and therefore this rule must be discharged.

Rule discharged.

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## ROPER v. PHILLIPS.

Security for  
costs not re-  
quired from a  
bankrupt  
plaintiff re-  
sident abroad.


IN Michaelmas Term a rule *nisi* for security for costs was obtained upon an affidavit, stating, that the defendant had gone to reside at Calais in July last, that in consequence thereof, a commission of bankrupt had issued against him, whereupon he had been duly declared a bankrupt; that the defendant was the sole assignee; that the plaintiff had not surrendered to his commission, and was still residing at Calais.

*Chitty* now shewed cause, upon an affidavit by the plaintiff's attorney, that the Lord Chancellor, in the matter of the bankruptcy, had, on the 27th of November, made an order upon a petition wherein it was alleged that the plaintiff had left London in consequence of a severe attack of illness; that the time for the plaintiff's surrender had been enlarged for 42 days; that the enlarged time would expire on the 2nd of December; and it was prayed that the time might be further enlarged for three months. The order then stated, that upon reading the affidavits of the parties, the Chancellor directed that the time should be enlarged for 14 days, the plaintiff paying the costs of the application. He relied upon the case of *M'Culloch v. Robinson* (a), where the Court of Common Pleas refused to stay proceedings until security should be given for costs in an action brought to try the validity of a commission of bankrupt issued by the defendant against the plaintiff who was with his family resident at New York.

*Manning*, contra. In *M'Culloch v. Robinson*, it was expressly sworn that the bankrupt was expected to return and to surrender to his commission; and that circumstance was relied on by the counsel, who shewed cause against the

(a) 2 N. R. 352.

rule, and no doubt operated with the Court, though not expressly adverted to in the printed judgment. Here the plaintiff has had ample time to make such an application if he had been warranted in so doing. The affidavit made by the plaintiff's attorney is of a novel kind. It merely states, that a certain order was made by the Chancellor; and a copy of that order is annexed to the affidavit. The course of drawing up such orders is to recite the allegation of the petition, whether true or false; and this affidavit is used, and was evidently framed for the purpose of inducing this Court to believe that these facts are verified by affidavit, because contained in an affidavit, although neither the defendant nor his client have pledged themselves to the truth of a single allegation. If, instead of the matter surmised in the *petition*, the facts stated in the *affidavits* before the Chancellor, had been presented to this Court, it is to be presumed that a very different impression would have been made, as the Chancellor granted only 14 days instead of three months, and ordered the plaintiff to pay the defendant the costs of the application.

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BAYLEY, J.—Under the particular circumstances of this case, we ought not to require security for costs. In *M'Culloch v. Robinson* security was refused under similar circumstances. There the Court saw that the plaintiff could give no counter-security. If we look to the reason of that judgment, we shall find that it was founded upon that consideration, and none of the judges rely upon the circumstance of the plaintiff's being expected to return. It would be a great hardship to require security for costs from a plaintiff who cannot have the means of indemnifying the parties who should enter into such an engagement for him. In the present case there appears to be good reason for supposing that the plaintiff's residence at Calais is of a temporary nature. It appears that he has been taking proceedings to enlarge the time for his surrender, and probably he

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will be in this country in a few days, as it cannot be presumed that he will be guilty of a felony.

The other judges concurred.

Rule discharged.

COLE, Administrator of COLE, v. HULME.

The omission of the word "pounds" may be supplied in a bond acknowledged "in the sum of 7700 of lawful money of Great Britain," conditioned for the payment of several sums, denominated as pounds, shillings and pence, although the sums secured amount to more than the half of 7700 pounds.

DEBT on bond for 7700/. Oyer of the bond and condition, but the latter only set out *in hac verba* (a). Plea,

(a) If the bond had been set out *in hac verba*, the defendant might have raised the point by demurring to the declaration on the ground either of variance, or of nullity. By this mode of proceeding, the task of construing the bond would have been directly thrown upon the Court; and even under the plea of *non est factum* it would seem that the jury were bound to receive the direction of the judge as to the effect of the instrument given in evidence, without exercising any discretion of their own, the construction of a written document being matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself. See Stark. Evid. part III. 429.

In craving oyer of the penal part of the bond, the usual entry is, "And it is read to him &c." But in *Wallace v. Duchess of Cumberland*, 4 T. R. 370, the Court said, that by craving oyer of the condition of a bond the defendant undertook to set out the whole con-

dition, including the recital (which was there omitted) in so many words, and that not having done so, the plea was bad, and that the plaintiff would have been warranted in signing judgment as for want of a plea. In that very case, though oyer was craved of the bond, no part of it appears to have been set out. The rule, therefore, seems to be, that by craving oyer, the defendant is not bound to set out the instrument which is read to him, but that if he do set out any part he is bound to state the whole. If this view of the practice be correct, the marginal note to *Wallace v. Duchess of Cumberland*, which states, that "If defendant, after craving oyer of a deed, do not set forth the whole deed, the plaintiff may sign judgment for want of a plea, or the Court will quash the plea," requires to be qualified. This note is adopted by Mr. Serjeant Williams, in 1 Saunders, 9 b. (1), though he afterwards, *Ib.* 317 (2), vouches this very case as an authority for the position that "if the

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*non est factum.* At the trial before Lord Tenterden, C. J. at the sittings at Guildhall after last term, the bond being produced, it appeared that the defendant thereby acknowledged himself to be bound to the intestate in the sum of seven thousand seven hundred of lawful money &c. (a) without saying "pounds." The condition was to repay two sums of 1000*l.* and 1500*l.* due to the intestate, and 2359*l.* 1*s.* 3*d.* being the moiety of the value of certain partnership effects, by instalments with interest. It was objected on the part of the defendant that the bond was void for uncertainty. The learned Judge was of opinion that inasmuch as it appeared to have been given to secure sums of money calculated in pounds, the jury would be authorized in supplying the word pounds; but his lordship saved the point.

Sir James Scarlett now moved to enter a nonsuit agreeably to the liberty reserved. The omission renders the bond void. *Loggins v. Titheton*(b); Com. Dig. *Obligation A*; *Ib.* B 3, 5; *Ib.* *Fails* F 1, unless indeed the intent be clearly

condition of a bond, or if any indenture or other deed, of which oyer is prayed, contain other matter besides those which are to be performed by the party craving oyer, it does not seem to be necessary to set out such matters at all, but it is necessary to set out verbatim the *whole* of the matters that relate to him." This distinction, however reasonable, does not appear to be supported by any decided case, and it is directly contrary to the judgment of the Court in *Wallace v. Duchess of Cumberland*.

(a) If the words in italics had not been inserted, the case would have been stronger for the defendant, as it would have been open to him to contend that the intention of the parties might be, that he

should be bound in 7700 quarters of wheat, or of malt, a form of obligation which in ancient times was very common, not only where a delivery of wheat or malt was to be enforced, but where the condition was for the payment of a sum of money. These words also seem to indicate that the penalty was to be fixed in that denomination of money in which computations are ordinarily made. It is not usual to speak of *the sum of so many guineas*, or to describe guineas as lawful money of Great Britain. Marks and nobles have long become obsolete, except in attorneys' bills, and even there they are translated into 13*s.* 4*d.* and 6*s.* 8*d.*

(b) *Yelverton*, 225. But see *S. C. Cro. Jac.* 309.

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apparent upon the face of the instrument itself. For some purposes the bond and condition are one instrument, but for others they are distinct instruments. Thus the bond will remain good although the condition should be impossible, and therefore void. But if the condition can be looked to for the purpose of explaining the bond, it does not in this case afford the means of knowing with certainty in what manner the blank ought to be supplied. The aggregate of the sum mentioned in the condition is 4859*l.* 1*s.* 3*d.* which would not be secured by a penalty in double the principal sum, as is the usual course, if we read 7700 *pounds*. Marks would answer the purpose as well; guineas as well or better. If this intendment is made, the Court may be asked to supply the omission of the number by presuming that the number meant to be placed before the word "pounds" would be the double of the sum under the condition, which presumption would be contrary to the supposed case put in *Loggins v. Titheton*, and would in the present case have been directly at variance with the fact.

LORD TENTERDEN, C. J.—To enable the Court to supply such an omission there must be that sort of moral certainty which leaves no doubt upon the mind as to the intention of the parties. It must not be left to conjecture. I think no one can reasonably doubt but that the word "pounds" was omitted here by mistake. Then there are authorities to shew that a blank in a deed may be supplied when it is obvious what the intention was. Here it is evident from the construction that the parties were making their calculation, and were treating with reference to pounds. This being so, I cannot entertain a doubt that the intention was, that the defendant should be bound in a penalty calculated in pounds.

BAYLEY, J.—It has been held that a blank may be supplied when the intention of the parties is clear. Here I think the meaning is obvious.

LITTLEDALE, J.—There can be no doubt as to what was intended by these parties; but I have great difficulty in saying that this will do. Upon the whole, however, I think that it will do.

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Rule refused.

CLARK v. UPTON, Gent. one, &c.

**ASSUMPSIT.** The declaration contained a special count upon the breach of a contract of a sale, in not making out a good title; with the common money counts. Plea, non-assumpsit, upon which issue was joined. At the trial before *Bayley, J.* at the last assizes for the County of York (*a*), the following facts appeared:—On the 28th of September, 1825, the defendant offered for sale by public auction two lots of building ground in the parish of Leeds. The plaintiff being the highest bidder for one lot, was declared the purchaser at 248*l.* 4*s.*, and a memorandum of the contract, under which the purchase was to be completed on 2d of February, 1826, was signed by both parties at the foot of the conditions of sale. On the 30th of September, 1825, 72*l.* 9*s.* 1½*d.* was paid by the plaintiff to the auctioneer, being the amount of the auction duty, and on the 11th of October, 248*l.* 8*s.* was paid by the plaintiff to the defendant himself as a deposit, and in part of the purchase money. Several objections were taken to the title, which had not been satisfactorily answered when the action was commenced. In 1827, the plaintiff's affairs became embarrassed, and several meetings of his creditors were called by him, at one of which, plaintiff delivered in a statement of his debts. In the same account he noticed

(*a*) Counsel for the plaintiff, *Brougham and Patteson*; for the defendant, *F. Pollock and Joshua Evans*.

*A.* having agreed to purchase an estate, and paid a deposit, *B.* the seller is unable to make a good title by the stipulated day. *A.* afterwards, upon negotiating a compromise with his creditors, states his apprehension that he may be compelled by *B.* to complete the purchase, and applies to *B.* to cancel the contract, and return the deposit. *B.* refuses to do either, but says that he will never take any steps against *A.* to enforce the contract. Upon this footing, the composition proceeds; *C.* engaging to secure 7*s.* in the 1*l.* It would be a fraud upon the creditors, and upon *C.* if *B.* were to seek to enforce the contract; and therefore *A.* cannot maintain an action against *B.* for the deposit.

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the auction duty and deposit money which he had paid, and the expense which he had incurred in investigating the title. This he stated as a good debt, upon which he had been advised that he could recover against the defendant. After some discussion, the plaintiff said that he was willing to give this up to his creditors for them to make the best of it, the title then being under litigation. He added, that he should not wish to make an end of other demands upon him, and to have that hanging over his head, and that he was afraid that the defendant would afterwards take steps to compel him to complete the purchase, when he should be without the means of defending himself. In consequence of this, the plaintiff's attorney, in company with one of the creditors, applied to the defendant to refund the amount, or to make some division or compromise. The defendant refused to do either. He said he would not annul the contract, but that he would never take any steps against the plaintiff to enforce it. This was communicated to the plaintiff, and upon this assurance, the arrangements with the creditors proceeded, the plaintiff's father-in-law securing a composition. Upon this evidence, the learned Judge was of opinion, that inasmuch as the plaintiff, upon being informed that the defendant would take no steps to enforce the contract, sent no message back instant, that he would not consent to put an end to the contract upon those terms, he must be taken to have assented to an arrangement, by which the sale was put an end to, the plaintiff abandoning any claim to recover the money which he had advanced. He accordingly directed a nonsuit, giving the plaintiff leave to move to enter a verdict for 325*l.* 17*s.*

*Brougham* now moved according to the liberty reserved. The plaintiff never agreed to give up his right to the deposit. It is true that he expressed his willingness to give it up to the creditors, to do what they pleased, and it was proved that upon that assurance the composition was entered into, and the plaintiff's father-in-law entered into

an engagement to pay the creditors seven shillings in the pound. The defendant, however, expressly refused to cancel the contract. There was, therefore, no consideration to the plaintiff for giving up his right to the deposit.

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LORD TENTERDEN, C. J.—The point is put very correctly, on the ground of want of consideration; that if the defendant was not bound to abstain from enforcing the contract, the plaintiff is not restricted from suing for the deposit. But I think the defendant could not have sued. The plaintiff, wishing to be released from his creditors, and knowing, that whilst he remained open to an action on the contract, his father-in-law would not enter into an arrangement with the creditors, applies to the defendant to cancel the contract, and return the deposit. This the defendant refuses to do, but says, you may assure the plaintiff I will never sue him on the contract. If the defendant had afterwards sued the plaintiff, it would have been a fraud on the creditors and on the father-in-law.

LITLEDALE, J.—I think the nonsuit was right.

BAYLEY, J.—The ground upon which I nonsuited the plaintiff was, that it would have been a fraud in the defendant to have sought to enforce the contract.

Rule refused (a).

(a) And see *Carpenter v. Blandford*, post, 93.

#### MICKLAM v. BATE.

TO a declaration in assumpsit, the defendant filed a plea of misnomer in abatement. The plaintiff demurred, and the defendant joined in demurrer. The defendant having ruled the plaintiff to enter the issue, which he omitted to do, signed judgment of *non-pros*, and issued a *capias ad satisfaciendum* against the plaintiff for his costs, amounting

No costs upon a judgment of *non-pros* for not entering the issue upon a demurrer to a plea in abatement.



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to 10*l*. On a former day in this term *J. Jervis* obtained a rule to shew cause why the writ of *capias ad satisfaciendum* should not be set aside for irregularity with costs; against which,

*Follett* now shewed cause, contending that the defendant was entitled to his costs. It is true, that upon a judgment on demurrer to a plea in abatement which does not go to the merits, a defendant is not, under the statute 8 and 9 *W. 3*, c. 11, s. 2, entitled to costs. That statute gives costs to the plaintiff only where the benefit is reciprocal. But where judgment of *non-pros* is signed, the defendant is, according to the books of practice, entitled to costs in every case. *Haves v. Saunders* (a), *Davis v. James* (b). The only ground of objection urged is, that a defendant is not entitled to costs on a demurrer to a plea in abatement; but this case does not come within the purview of the statute of *William* (c). It is the same thing as if the judgment of *non-pros* had been signed in any other stage of the cause. The plaintiff abandons all previous proceedings.

*Campbell* and *J. Jervis*, contra. The defendant can only be entitled to costs of *non-pros* under 4 *Jac. 1*, c. 3. (d). That statute gives no costs in cases of demurrer. Costs upon demurrer are given by 8 & 9 *Will. 3*, c. 11, s. 2. But that statute does not apply, unless the demurrer goes to the merits. If the demurrer had been argued, and the defendant had obtained judgment, he would not have been enti-

(a) 3 Burr. 1584.

(b) 1 T. R. 371.

(c) 8 & 9 *Will. 3*, cap. 11, sect. 2, which enacts, "that if any person shall commence an action where, on demurrer, either by plaintiff or defendant, judgment shall be given by the Court against the plaintiff, the defendant shall have judgment to recover his costs."

(d) Which provides, "that if any person shall commence any action in any Court wherein the plaintiff or defendant might have costs in case judgment should be given for him, and the plaintiff after appearance be nonsuited, or a verdict pass against him, then the defendant shall have his costs."

tled to costs; and he cannot be in a better situation by reason of the plaintiff's having abandoned his action. That statute has been held not to extend to demurrers to pleas in abatement, *Thomas v. Lloyd* (a), or to actions in which no costs are recoverable by the defendant upon non-suit or verdict. *Thrale v. Bishop of London* (b).

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LORD TENTERDEN, C.J.—If the issue had been entered, and the defendant upon argument had proceeded on the demurrer, he would not have been entitled to costs. By the course which the plaintiff has taken, the defendant is saved the expense of arguing the demurrer. Then he ought not to be in a better situation than he would have been in if he had succeeded upon the argument of the demurrer.

The other Judges concurred.

Rule absolute, but without costs.

(a) 1 Lord Raym. 336; 1 Salk. 194. (b) 1 H. Bla. 530.

#### CARPENTER v. BLANDFORD.

**ASSUMPSIT** for money had and received. Plea, non assumpsit. At the trial before Lord Tenterden, C. J. at the Sittings after last term, the following facts appeared (c). On the 25th of February, 1828, defendant agreed to sell plaintiff his interest in a public-house at 262l., stock and fixtures to be taken at a valuation. The 262l. and the amount of the valuation to be paid on taking possession, on

(c) Counsel for the plaintiff, *Campbell*; for the defendant, Sir J. Scarlett and Chitty.

formed on that day that the purchase will not be completed until the following day, and no objection is made; the vendor cannot on the second day insist upon the forfeiture.

Upon a sale of an interest in a house, the fixtures to be taken at a valuation, and deposit forfeited if purchase, through default of purchaser, is not completed on a certain day, the vendor's agent is in-

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or before the 25th of March. The plaintiff paid into the hands of the defendant 30*l.*, part of the purchase money, by way of earnest, to be forfeited if the plaintiff should not complete his part of the agreement. On the 25th of March, after some progress had been made in the valuation, the appraiser appointed by the plaintiff informed the defendant's appraiser that he could not attend to finish the valuation on that day, but that he would do so on the following day before three o'clock, at which time the plaintiff would be ready with the remainder of the purchase money. This communication was received without objection. On the morning of the 26th March, the plaintiff attended with his appraiser to complete the valuation. The defendant said that they ought to have come on the preceding day, and refused to allow the valuation to proceed. It was contended on the part of the defendant, that as the defendant had been ready on the 25th, and the plaintiff had omitted to perform his part of the agreement on that day, the defendant was entitled to retain the 30*l.* as a forfeited deposit. The learned Judge ruled, that if the defendant, after the intimation received by his appraiser that the valuation would not be finished on the 25th, meant to insist upon a strict performance of the contract, he was bound to give notice to the plaintiff of his intention to require that the purchase should be completed on that day. A verdict having been found for the plaintiff,

Sir *James Scarlett* now moved for a new trial. The cases of *Berry v. Young* (*a*), frequently cited by Mr. *Sugden* in his *Law of Vendors and Purchasers* (*b*), and *Lloyd v. Collett* (*c*), lay down this principle, that the day is material where the parties have chosen to consider it so. Here it is made an essential part of the contract.

(*a*) 2 Esp. N. P. C. 640, n.

9; seventh, 32, 40, 355, 61, 463, 4.

(*b*) Sixth edit. 32, 9, 341, 7, 447,

(*c*) 4 Ves. 690, n.

BAYLEY, J.—The defendant's agent was told on the 25th that the plaintiff would be ready to pay his money at three o'clock on the following day. This must be presumed to have reached the defendant; and if he meant to insist upon the non-completion of the purchase on that day as a forfeiture, it was his duty to make a prompt communication to the appraiser, that if the valuation was not finished on that day, he should consider the agreement as broken (*a*). This not having been done, the plaintiff is warranted in demanding his money back again (*b*).

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The other Judges concurred.

Rule refused (*c*).

(*a*) See *Clark v. Upton*, *ante*, 89.

(*b*) So in equity, though the vendor should have omitted to furnish an abstract, yet if the vendee do not call for it at or before the time appointed for its delivery, or until it has become impossible to complete the purchase by the day fixed, the time is considered as waived. *Jones v. Price*, 3 Anstru. 924.

So, on the other hand, where the purchaser objects to the title, and declares that he will not complete the purchase, and the vendor, upon receiving that intimation, lies by for several months without cautioning the purchaser and informing him that he is going on to clear up the objection, he cannot afterwards, though he has perfected his title, compel the purchaser to complete the contract. *Guest v. Homfray*, 5 Ves. 818. And see *Tyree v. Williams*, 3 Bibb's Reports, (Am.) 365.

(*c*) "In an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties them-

selves have *mutually* fixed upon the time; the *bona fides* of such a transaction seems to be a bar to the interference of a Court of Equity; and if the contract be vacated by virtue of the agreement, the parties will still be in possession of their respective rights. We may, therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement that time shall be deemed of the essence of the contract, it must be so considered in equity. In the late case of *Hudson v. Bartram*, (12 Dec. 1818, MS. S. C. 3 Madd. 440; and see *Boehm v. Wood*, 1 Jac. & Walk. 419,) the Vice-Chancellor said that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end."—Sugd. V. & P. 7th ed. 379.

For the purpose of constituting time an essential part of the contract both at law and in equity,

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the following form has been suggested by the high professional authority already referred to, as proper to be inserted in the contract of purchase: "And, lastly, that if the said *A.* shall not deliver an abstract of his title to the said *B.* or his solicitor before the expiration of one calendar month from the date hereof, or shall not deduce a marketable title to the said messuages and premises, before the said — day of —, then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said — day of — (as the case may be), this present agreement shall be utterly void to all intents and purposes whatsoever<sup>(a)</sup>, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that, in the event aforesaid, execution of this agreement shall not be enforced by any Court of Equity, notwithstanding any rule (if such there be) that time cannot be made the essence of a contract, or any other rule or maxim whatsoever." Sugden's Vendors and Purchasers, 7th edit. 770.

The following form, however, appears to be more definite and precise, "The abstract shall be delivered on or before the — day of — next; the requisitions relative to the title within — days after delivery of the abstract; the answers within — days after delivery of such requisitions; the further requisitions arising out of the answers, within — days after delivery of such answers; the

replies within — days after delivery of such further requisitions; the title shall be finally perfected on or before the — day of — next; and the purchase shall be completed by execution of the conveyances, and payment of the unpaid purchase money, on the — day of — next. And if either party shall fail herein, the other party (*b*) shall be at liberty to vacate the sale, by giving notice in writing to that effect, within — days after default made, to the defaulter, who shall thereupon pay all the expenses incurred on both sides, by reason of this contract." Hayes's Concise Practical Conveyancer, 25. Another form has also been suggested by the same writer:—"If the vendor shall fail to deliver the abstract, or to answer the requisitions, or to perfect the title by the stipulated periods, and the purchaser shall within — days after such default, give notice of his intention to vacate the sale to the vendor; or if the purchaser shall fail (the vendor fulfilling the contract on his part,) to pay the remainder of the purchase money at the stipulated period, and the vendor shall within — days after such default give notice of his intention to vacate the sale to the purchaser, then and in either case the sale shall thenceforth be a nullity, (it being hereby agreed that time shall be deemed of the essence of this contract,) and the defaulter shall pay, &c. And if the purchaser be the defaulter, [his deposit shall be absolutely forfeited

(a) i. e. if *B.* choose so to treat it.

(b) The term "other party" here appears to extend to the personal representatives of both vendor and purchaser, where the subject-matter of

the contract to be repudiated is personal estate; and to the real representative of the vendor and the personal representatives of the purchaser, of an estate of inheritance.

to the vendor, and the vendor shall be at liberty to resell the said hereditaments by public auction or private contract, and the deficiency, if any, on such second sale, with all incidental expenses, shall be paid by the purchaser to the vendor, who may recover the same as liquidated damages, without previously tendering a conveyance." Ibid. And see *Cornish v. Rowley*, Middlesex sittings after M. T. 1800, *coram* Lord Kenyon,

Selw. N. P. 7th ed. 177; *Wilde v. Fort and others*, assignees of *Brickwood*, 4 Taunt. 334; *Hagedon v. Luig*, 1 Marshall, 514; *Wright v. Howard*, 1 Simons & Stuart, 190; *Parker v. Frith*, *ibid.* 199, n.; *Doloret v. Rothschild*, *ibid.* 590; *Heaphy v. Hill*, 2 S. & S. 29; and the observations upon the extrajudicial opinion, in *Lang v. Gale*, 1 M. & S. 111, as to the immateriality of time in a contract of sale, in Sugd. V. & P. 7th edit. 356, &c.

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#### HEAD v. DIGGON.

**ASSUMPSIT.** The declaration stated, that plaintiff bargained for, and bought from defendant, certain large quantities of wool, to wit, at and for a certain rate or price, to wit, at or for the rate or price of 9*l.* 10*s.* for each and every pack thereof, and thereupon, in consideration of the premises, and that plaintiff had undertaken to accept and pay for said wool at and for, &c., defendant undertook that he would, within a reasonable time, deliver said wool. Averment, that a reasonable time had elapsed, and that plaintiff had always been ready and willing to receive and pay; whereof defendant had notice: Yet defendant did not deliver within such reasonable time, or at any time. Whereby plaintiff lost great gains and profits. Second count, stating the consideration to be, that plaintiff *would buy*, receive, and pay, and alleging a promise to sell and deliver, and a readiness to buy, accept, and pay. Third count, laying the promise to deliver on request. At the trial before *Holroyd, J.*, at the last assizes for the county of Suffolk (*a*), the following facts appeared. The plaintiff is a wool-factor in Bury St. Edmund's, the defendant is a fellmonger at Thet-

*A.* and *B.* being together, *B.* offers goods to *A.* at a certain price, and gives *A.* three days to make up his mind. Before the three days expire, *B.* offers the goods to *C.* *A.* cannot declare against *B.* as upon an absolute bargain; and *semble*, that *B.* had a right to retract.

(*a*) Counsel for the plaintiff, *Storks*, Serjt., and *F. Kelly*; for the defendant, *Prendergast*.

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ford. On Thursday the 17th of April, 1828, the plaintiff went to the defendant's house at Thetford to treat for the purchase of wool. After some discussion about the price, the plaintiff requested of the defendant time to consider of his terms. The defendant said he would give him a week. The plaintiff replied that three or four days would be enough. The defendant then wrote the following paper:

" Thetford, April 17th, 1828.

Offered Mr. *Head*, of Bury, the under wool, with three days' grace from the above date :

|                          |           |
|--------------------------|-----------|
| 40 Sussex head and lamb, | } £9 10s. |
| 40 Head ditto,           |           |
| 17 Broad head,           |           |

As per sample—delivered in good condition.

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On the following Monday the plaintiff went to the defendant to accept the wool, and to make arrangements for the delivery. The defendant said, that as the plaintiff had not seen him or written him on Sunday, he had given a price to one *Fyson*. The plaintiff said that Sunday was not a day of business. The defendant persisted in refusing to deliver the wool. Upon this evidence the learned Judge was of opinion that the plaintiff had failed in proving a contract binding on both parties, and on the authority of *Cooke v. Oxley* (a) directed a nonsuit, which

*Storks*, Serjt., now moved to set aside. It is true, that

(a) 3 T. R. 653. Declaration stated that defendant had proposed to plaintiff to sell and deliver to him the goods upon certain terms, if the plaintiff would agree to purchase them upon those terms, and would give the defendant notice thereof before four o'clock on that day. Averment, that the plaintiff did agree, and did give the re-

quired notice, but that the defendant, on request, did not deliver the goods. After verdict the judgment was arrested in this Court, on the ground that the engagement was not mutually binding, and was therefore *nudum pactum*. And the judgment of B. R. was affirmed in the Exchequer Chamber. *Ibid.* note to 2d Edit.

up to a certain period one party was at liberty; but in *Adams v. Lindsell* (a), the defendant offered to sell certain goods to the plaintiff, receiving an answer by return of post. The letter being misdirected, the answer, signifying the acceptance of the offer, arrived two days later than it ought to have done. The defendant had on the preceding day sold the goods to a third person. The Court held that this was a binding contract, and that an action lay for non-delivery of the goods. *Cooke v. Oxley*, upon which the other side relies, was cited in *Adams v. Lindsell*, and may be considered as overruled by the latter decision. [Lord Tenterden, C. J., Must both parties be bound, or is it sufficient if one only is bound? You contend that the buyer was to be free during the three days, and that the seller was to be bound. The declaration treats it as a complete contract, an absolute and unconditional bargain. Those counts are not proved. Whether a declaration could be framed to meet the facts, we are not called upon to decide.] The declaration applies to the contract at the period when, by the plaintiff's acceptance, it became complete.

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Lord TENTERDEN, C. J.—If the contract is to be taken

(a) 1 Barn. & Ald. 681. *Adams v. Lindsell* was decided upon the ground that a party who sends a proposal by letter must be considered as renewing his offer every moment, until the time at which the answer is to be sent. So in *Humphries v. Carvalho*, 16 East, 45, where a broker sold on a *Saturday* certain goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality on the *Monday* following, and sent the sold-note to the plaintiff on the *Saturday*, marked with the words, "Quality to be approved on *Monday*," but did not send the bought-note to the de-

fendant then, because he had met and informed him of the contract on the same day; but the plaintiff not having signified his disapproval of the contract on the *Monday*, the broker sent the sold-note to the defendant on the *Friday*, with the words "quality to be approved on *Monday*" struck out; which note the defendant returned within 24 hours, which by the custom of the trade signified his disaffirmance of the contract, as far as in him lay; yet held, that at any rate the defendant could no longer disaffirm it after the *Monday*, when the plaintiff, not having signified his disapproval, was also bound by it.



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as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree.

BAYLEY, J.—I am of the same opinion; and in *Routledge v. Grant* (a) it was held by the Court of Common Pleas, that unless both parties are bound, neither is bound (b).

Rule refused (c).

(a) 4 Bingh. 653; 1 Moore & Payne, 717, S.C. In that case *A.* offered to purchase of *B.* the lease of a house, possession to be given on the 25th of July, requiring a definitive answer within six weeks. *B.* answered that he accepted the proposal, possession to be given on the 1st of August. Afterwards, and before the end of the six weeks, *A.* retracted his offer. It was held that as the acceptance of *A.*'s offer by *B.* was not in the terms proposed, and as there was no proper acceptance before *A.* retracted, the agreement was vacated. It also appeared that *B.* had not the interest which he professed to sell, and two out of the three Judges in the Court gave their judgment upon the latter point only. Mr. J. Gaselee says, "If this case had rested wholly on the first point, I should have wished for time to consider, as the authorities to which we have been referred appear contradictory." In *Routledge v. Grant*, it might, perhaps, also have been contended that the new terms proposed by *B.*, by placing the treaty upon a different footing, amounted to a waiver of the original proposals.

(b) And see *Dilley v. Polhill*, 2 Strange, 923; *Antrom v. Chace*, 15 East, 209; *Kingston v. Phelps*, Peake, N. P. C. 227; *Biddell v.*

*Dowse*, 6 B. & C. 255; *Ferrer v. Oven*, ante, i. 222.

(c) In *Kennedy v. Lee*, 3 Merivale, 454, which was cited by the defendant's counsel in *Routledge v. Grant*, Lord Eldon said, "I have always understood the law of the Court to be, with reference to this kind of contract, that if a person communicates his acceptance of an offer within a reasonable time after the offer is made, and if within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute."

Pothier says, (*Traité du Contrat de Verite*, No. 32,) "In the contract of sale, as in other contracts, there may be consent of parties, not only between those who are present, but those who are absent, by letters or by an agent, (*entremetteur*,) *per epistolam*, *aut per nuntium*. In order to constitute consent in this case, it is necessary that the intention of the party who writes to another to propose the bargain, should continue until the time at which the letter reaches the other party, and at

which the latter declares that he accepts the bargain. This intention is presumed to continue as long as nothing appears to the contrary; but if I write to a merchant at Leghorn a letter, in which I propose to purchase of him a certain quantity of merchandize at a certain price, and before my letter can have reached him I write him a second letter, by which I intimate that I no longer desire to make this purchase; or if before that time I die, or lose the use of my reason, although this merchant of Leghorn, at the receipt of my letter, in ignorance of the change of my intention, or my death, or my insanity, answers that he accepts the proposed bargain, yet no contract of sale arises between us; for my intention not having continued until the time at which my letter

was received and my proposal accepted, the consent or concurrence of our wills, necessary to form a contract of sale, has not occurred. This is the opinion of Barthole and of the other doctors cited by Bruneman, ad legem 1, ff. de contractu emptionis, who have with reason rejected the contrary opinion of the Gloss, ad dictam legem."

After reading the judgment in *Kennedy v. Lee*, it is refreshing to return to this writer, (not, of course, to be judged of by the above translation,) whose luminous method in the investigation of abstruse and complicated propositions appears almost to justify the proverbial boast of his countrymen with respect to the redeeming excellence of their language: "Ce qui n'est pas clair, n'est pas Français."

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#### PATTISON v. JONES.

**CASE**, for a libel. The second count of the declaration stated, that defendant published a false, malicious, and defamatory libel, of and concerning the plaintiff, containing therein the false, scandalous, malicious, and defamatory libellous matter following, of and concerning &c.:—"I," (meaning the said defendant,) "have no hesitation in informing you, that I discharged my butler not only on account of drunkenness and absence from his duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wines, &c., in which I found a very great deficiency, upon an examination with the cellarman who packed it up to be brought down to Putney, and who took a regular account of it, which I have. *Pattison* had the audacity to open all those packages without any authority from me; and he acknowledged that fact yesterday before witnesses, when he was so conscious of

Where a master, without being applied to, volunteers to give an unfavourable character of a discarded servant, it is *prima facie* malicious, and not a privileged communication.

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his misconduct, that he said he would not take any situation in the neighbourhood of Putney." Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster after last Trinity term (a), the following facts appeared. The plaintiff had lived with the defendant as his butler, and having been dismissed from the defendant's service, offered himself in the same capacity to Mr. Mornay. This circumstance coming to the knowledge of the defendant, he addressed the following letter to Mr. Mornay:—

" Sir, Putney, 25 April, 1826.

" Having been informed that you had an intention of taking my butler into your service, I feel it incumbent on me as a neighbour to inform you that I have just discharged him for misconduct, and that I cannot feel myself justified in recommending you to engage him. I have been rather surprised that you have not applied to me for his character, but I shall not think any thing more about it (b).

" I am, &c.

" *A. F. Mornay, Esq.* W. JONES."

To this letter Mr. Mornay returned the following answer:

" Sir, Putney Heath, 26 April, 1826.

" It is necessary that you should state the particulars of the misconduct of your butler, to determine me to deprive him of the situation for which he has applied to me. Is he sober and honest? You will of course consider that there ought to be strong grounds for depriving a man of his character and his bread. I will only add, to avoid any misunderstanding upon this point, that I did not seek to take him from your service, but that he asked for the situation in my house, in consequence, he said, of your intention to part with him. I am, &c.

" *W. Jones, Esq.* A. F. MORNAY."

(a) Counsel for the plaintiff, *Brougham*, *Denman*, and *Platt*; for the defendant, Sir *J. Scarlett* and *Campbell*.

(b) The plaintiff declared in his

first count upon this the defendant's first letter, with a special inducement, and laying special damage; but this count was abandoned at the trial.

To which letter the defendant sent an answer, part of which is set out in the second count of the declaration; the remainder was as follows:—

“ Under these circumstances I thought it right and neighbourly to put you on your guard about him which Mr. Read and I ought to do. I intended to have furnished you with more information, not merely about him, but about another person; but as you have not treated the information I have given you in the way I took it for granted you would have done, I shall decline to do so, particularly as I am quite sure that you will in time be convinced of the rectitude and propriety of my conduct. After what I told Pattison yesterday about the wine, I do not think he will like to live in the neighbourhood of Putney; but I have no objection to your taking him into your service, provided you think you can with propriety do so after what has passed.

I am, &c.

“ A. F. Mornay, Esq.

WILLIAM JONES.”

On the part of the defendant it was contended that this was a privileged communication, and that without proof of express malice, the plaintiff must be nonsuited. On the part of the plaintiff it was insisted, that as the communication originally proceeded from the defendant, it lay upon him to shew the motive of his officious interference. The learned Judge was of opinion that it was a question for the jury, whether, in writing the second letter, the defendant had acted *bonâ fide*, or with a view to injure the plaintiff. A verdict having been found for the plaintiff, damages 80*l.*,

Sir J. Scarlett now moved for a new trial. This was a privileged communication. It was a duty which the defendant owed to society to communicate to *Mornay* his knowledge of the misconduct of the plaintiff, whether applied to for that purpose in the present instance or not. The act was *primâ facie* lawful, and it lay upon the plaintiff to impeach the defendant's conduct by evidence of a malicious intention.

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LORD TENTERDEN, C. J.—Though the defendant's second letter was written in answer to inquiries made by Mr. *Mornay*, yet as those inquiries were invited by the defendant, it appeared to me to be a question for the jury whether that letter was written *bonâ fide* under an impression that the defendant was performing a duty which he owed to *Mornay*, or whether it was written with the malicious intention of injuring the plaintiff. Witnesses were called on the part of the defendant for the purpose of substantiating the charges contained in his second letter. As no justification was pleaded; I doubted the admissibility of this evidence, but I did receive it (a). The jury having found that the communication was made with a malicious intention, I think the plaintiff was entitled to a verdict.

BAYLEY, J.—If this was a privileged communication, it would be a good defence under the general issue. In general, whatever is said by a master in giving the character of a servant, is to be considered as a privileged communication; but if the communication be not made *bonâ fide*, it does not come within the protection. I do not say that it is essential to this privilege that the person claiming it should have been put into action by the opposite party. A person who knows that another is about to take a servant who ought not to be taken, may induce the other party to make inquiries of him, and the answers to such inquiries, if made *bonâ fide*, will be privileged; but under such circumstances it will be a question for the jury whether the party acted *bonâ fide* from a sense of duty, or maliciously with a view to injure the plaintiff.

LITLEDALE, J.—The question whether this was a *bonâ fide* communication or a malicious libel, was properly submitted to the jury. In the consideration of that question it may make a material difference whether the defendant volunteered to make the communication, or whether he was

(a) *Vide Rogers v. Clifton*, 3 Bos. & Pull. 587.

originally called upon to do so by the other party. Stronger evidence of *bona fides* may reasonably be required in the one case than in the other.

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Rule refused (a).

(a) And see *Hargrave v. Le Breton*, 4 Burr. 2425. So where a servant has lived successively with A. and B., and the latter, upon dismissing him, calls upon A. to request that he will not give him another character, and after-

wards, upon being applied to himself, gives the servant a bad character, which he is not able to prove, it was held that malice might be inferred by the jury. *Rogers v. Clifton*, 3 B. & P. 587. And see *Child v. Affleck*, post, iv.


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WOOLLEY v. SCOVELL.

CASE for negligence in throwing a bag of wool from a lofty warehouse into a yard, whereby the wool fell upon the plaintiff, who was in the yard, and injured him. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after last term (b), the following facts appeared:—The defendant was the occupier of a warehouse, the windows of which opened into a yard. Having occasion to remove a bag of wool from an upper floor of the warehouse, the defendant, for the purpose of saving time and expense, directed his servants to throw the wool out of the window of the warehouse. Before the bag was dropped from the window, one of the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell upon him, and he sustained a considerable injury. The learned Judge told the jury, that if they were of opinion that the plaintiff ran wantonly or carelessly into danger, they ought to

Where A., by the wrongful act of B., loses his presence of mind, and in consequence runs into danger, and receives an injury from the act of B., the latter is not protected by a warning given to A. immediately before the accident.

(b) Counsel for the plaintiff, —————; for the defendants, Sir J. Scarlett and F. Kelly.

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find a verdict for the defendant; but that if they thought the plaintiff had lost his presence of mind by the act of the defendant, and in the confusion produced by the situation in which he found himself, had run into the danger, they ought to give their verdict for the plaintiff. The jury found a verdict for the plaintiff, damages 150*l*.

Sir *J. Scarlett* now moved to set aside the verdict, on the ground of misdirection. The rule laid down by the learned Judge was very humane, but it is submitted that it was not founded in law. The law should not vary according to the nerves of parties. It is true that with respect to ships, the loss must be borne by the party who was first in the wrong; but there the other party has not the entire control over the motions of his vessel, which depend upon the winds and waves. [*Bayley, J.* You complain of that part of the direction in which the jury were told, that if the plaintiff was deprived of his presence of mind by the wrongful act of the defendant, he was entitled to their verdict; not that the facts of the case did not warrant such an inference.]

LORD TENTERDEN, C. J.—The first fault was the throwing of the wool from the window instead of lowering it by the usual mode, by a crane. This, the defendant admitted, he did to save time.

BAYLEY, J.—I think the direction was right. Whether the plaintiff was deprived of his presence of mind by the act of the defendant, was a question for the jury.

LITTLEDALE, J.—I have no doubt whatever that the direction was right. It is not surprising that the plaintiff should have been alarmed, and should thereby have lost his self-possession; and this alarm was occasioned by the wrongful act of the defendant.

Rule refused.

DOE *d.* ROBY *v.* MAISEY.

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**EJECTMENT** for lands in the county of Gloucester. At the trial, before *Gaselee*, J. at the last assizes for that county (*a*), a mortgage executed by the defendant to the lessor of the plaintiff was put in and proved. On the part of the defendant, it was contended that the plaintiff was bound to go further, and to shew the defendant's possession to be wrongful, by proof of a demand of possession before the day of the demise laid in the declaration. The learned Judge was of opinion that no demand of possession was necessary, but saved the point. A verdict having been found for the plaintiff,

Mortgagee may recover in ejectment against the mortgagor without a demand of possession.

*Talfourd* now moved to enter a nonsuit, agreeably to the liberty reserved. The mortgagor is tenant to the mortgagee, *Partridge v. Bere* (*b*); and even a mere tenant at will

(*a*) Counsel for the plaintiff, *Philpotts*; for the defendant, *Talfourd*.

(*b*) 5 B. & A. 604. In that case the Court said:—"Here the mortgagor was in the actual possession of the mortgaged premises by sufferance of the mortgagee, who has the legal title vested in him. The former, therefore, was *tenant* in the strictest definition of that word." That was a case in which the mortgagee declared in the character of reversioner for an injury done to the mortgaged premises whilst in the possession of the mortgagor. In order to recover a compensation for that injury in an action on the case, it was necessary that the plaintiff should shew that he was not himself in possession, and that he would be entitled to the possession at a future period. The precise relation

existing between the occupier and the plaintiff seems to be immaterial, as a *remainder-man* may sue in case in respect of an injury to the inheritance committed during the continuance of the particular estate.

Whether the mortgagor in possession is to be considered as a tenant at will, or as a tenant at sufferance, seems to depend upon the proof, or absence of proof, of assent to such possession on the part of the mortgagee. Until such proof is given, the mortgagor remaining in possession contrary to his own conveyance, would appear to be a wrong-doer, and merely a tenant by sufferance. As in strictness the mortgagee is entitled to receive his interest, and *also* to possess the land, subject to an equitable liability to account for the profits, it may perhaps be doubted whether



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is not liable to an action of ejectment until the will is deter-

the mere receipt of interest would be conclusive evidence of assent by the mortgagee to the possession of the mortgagor. But supposing the mortgagor, by the assent of the mortgagee, express or implied, to the possession of the mortgagor, to have become tenant at will to the mortgagee, it might still be questionable whether, as that possession was merely gratuitous, without any reservation of rent or other consideration for the permission, any demand of possession would be necessary.

A mortgage, strictly speaking, is an estate created by a borrower in favour of a lender, defeasible upon the repayment of the loan on a particular day. Litt. sect. 332. Such a conveyance, it is obvious, may create an inconvenient link in the title, both of mortgagor and mortgagee, from the difficulty of ascertaining whether the money was or was not paid at the appointed day, and whether, therefore, the legal estate, after that day, is in the borrower or the lender: and in modern conveyancing the usual course is, to give to the lender an absolute and indefeasible estate, inserting in the conveyance a proviso, and sometimes also a covenant, that, upon payment of the debt and interest on a certain day, the lender shall *re-convey* the estate. This species of security being introduced to effect the same purpose as a true mortgage, is generally confounded with it. Such *quasi* mortgage is in reality an absolute conveyance of an estate upon a valuable consideration, accompanied with a trust to re-convey in a certain

event; which trust whether enforced by a covenant or not, cannot affect the nature of the legal estate conveyed, though from the evidence which it affords of the intention of the parties, it gives a Court of Equity power to consider the transfer as a mere pledge. Where there is a true mortgage, the legal rights of the parties are the same as in the case of every other conveyance upon a condition subsequent; viz. until performance of the condition, the feoffee, bargainee, lessee, &c., is considered the legal owner of the property conveyed, as fully as if no such condition existed; and upon the performance of the condition, the feoffor, bargainor, lessor, &c., is in of his former estate, as if no conveyance had been executed. At law, therefore, it would seem that the Court, which has nothing to do with the pignoratitious character of the transaction, any more than with the motives which may have induced a vendor to sell his estate, has only to look to the form of the conveyance, whether it be by feoffment, bargain and sale, demise, or otherwise, and whether it be absolute or conditional, and thereby to ascertain what quantity of estate passed under it, and in whom the legal interest is now vested. Thus when it is said that a mortgagor shall never be permitted to dispute the title of his mortgagee, this position is founded, not upon the relation of mortgagor and mortgagee, but upon the general principle that a man is estopped from setting up a title inconsistent with that which he

mined; the mere bringing of the action is not sufficient,

has by his own deed affected to convey. *Goodtitle d. Edwards v. Bailey*, Cowp. 599. The introduction of the term "mortgage" into an inquiry as to the legal rights of parties appears to be calculated to produce no other effect than perplexity and confusion.

In equity, the estate, whether absolute or conditional, and whether the condition be broken or not, is merely a pledge, distinguishable from a simple charge only by the incidental right of foreclosure (which, however, does not exist in what is called a Welch mortgage).

A provision is commonly inserted, declaring it to be lawful for the grantor, his heirs and assigns (where he has the inheritance,) or his executors, administrators and assigns, (where he has only a chattel interest,) to hold and enjoy, and receive the rents till default in payment. It has been considered (Coote on Mortgages, 327, 5 B. & A. 606, n.) that the effect of this provision is to carve out and vest in the grantor, an intermediate chattel interest, or, in other words, a term of years; but the case referred to as supporting this position, seems by no means to warrant it. It is true that in *Powseley v. Blackman*, Cro. Jac. 659, the mortgagor was to remain in possession until default: but the chattel interest there under consideration was not the estate of the mortgagor, but that of his lessee for years. The consequence of this construction in the case of a freehold mortgage, would be, that as the course of legal devolution cannot be changed

at the will of the parties, the legal term must devolve upon the executors or administrators of the grantor, and that the heir for whom the benefit was intended, can obtain it only through the circuitous medium of a suit in equity. Nor does this construction appear to be consistent with the words of the proviso, which if it must be taken to create a legal interest, seems rather to import a limitation of the fee to the grantor, his heirs and assigns, until default, as in the ordinary case of a limitation in a marriage settlement to the settlor, his heirs and assigns, until the marriage. Where the mortgage is effected by a grant or release to uses, this defeasible estate of the mortgagor would be carved out of the seisin of the grantee, or releasee to uses; but where the mortgage deed purports to operate by transmutation of possession as a common law conveyance, it is conceived that the covenant or *proviso* for the retention of the possession until default in payment, would raise a use of the fee in favour of the mortgagor, in whom it would be executed *eo instanti* by the statute. It would seem that the intention of such a limitation could not be satisfied by any other construction, and that the result in the case of the settlement would not be in any respect different, if the fee were at once limited to the settlor, with a proviso, that until the marriage it should be lawful for him, his heirs and assigns, to hold and enjoy, (i. e. as in his former estate,) and receive the rents. If so, we have

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*Goodtitle d. Gallaway v. Herbert (a).*

LORD TENTERDEN, C. J.—It is the constant practice for the mortgagee to recover in ejectment against the mortgagor without proof of any demand of possession. In *Partridge v. Bere* we held that the mortgagor was merely tenant by sufferance.

Rule refused.

ascertained the legal effect in every stage of that species of assurance called a mortgage, so far as regards the construction of the deed itself. The interest of the mortgagor retaining the possession under such a proviso, cannot be an estate at will, for then it would be determined by underletting, which it clearly is not. *Powsely v. Blackman*, Cro. Jac. 659.

The nature of the legal relation subsisting between the grantor and grantee, (i. e. mortgagor and mortgagee,) independently of express contract, must be determined upon principles still less connected with what, borrowing a term from the Digest, we have called the pignoratitious character of the transaction. When the proviso for quiet enjoyment until default has ceased to operate, the relative situation of the mortgagor and mortgagee is reduced to the simple case of *A.* in possession of *B.*'s estate, upon these terms, viz. that as *A.* is holding over after a possession originally rightful, he is not a mere trespasser, but is tenant either at will or at sufferance, according to the assent or non-assent of the mortgagee.

A mortgage for years, is generally created by way of bargain and sale, to avoid the necessity of an actual entry. However, the mortgage money expressed to be

paid as the consideration, would, without words of bargain and sale, raise a use executed by the statute. And see Sugd. Powers, 4th edit. 9, 10. As it is immaterial by whom the price is paid, it might perhaps have been contended, in *Chatfield v. Parker*, ante, ii. 540, that the first term was executed in W. S. & J. C. In the note to that case, 542 (a), for "W. S. & J. C." read "Dowse."

In *Birch v. Wright*, 1 T. R. 383, *Buller*, J., expresses an opinion that the designations of mortgagor and mortgagee are quite sufficient, without having recourse to any other description; but when it is considered in what very different positions a mortgagor and mortgagee may be placed with regard to their legal rights, by reason of the conveyance being a real, or a quasi mortgage, and by reason of its containing, or not containing, a proviso for the mortgagor's continuing in possession, and by reason of the form of the operative words, the premises and *habendum*, and that when all these are ascertained, the peculiar rights and liabilities of the parties, *quæ* mortgagor and mortgagee, depend wholly upon equitable principles, the use of such vague terms seems calculated to create difficulties, rather than to remove them.

(a) 4 T. R. 680.

DOE d. CARR, Widow, v. BILLYARD.

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**EJECTMENT** for lands at Coningsby, in the county of Lincoln. At the trial before *Best*, C. J., at the last Summer assizes for the county of Lincoln (*a*), the facts appeared to be these. *William Torry*, the father of the lessor of the plaintiff, died seised, leaving also a son, whose children were still alive. His widow entered and married *Holmes*. *Holmes* and his wife died in December, 1779, upon whose death the lessor of the plaintiff entered, and three months afterwards, in March, 1780, married *John Carr*. The defendant claimed under some conveyance from *John Carr*. Upon this evidence it was contended for the lessor of the plaintiff, that though she was not the heir of *William Torry*, yet she had an adverse possession of 50 years, inasmuch as the possession of *John Carr* being derived from her, was in her right, and referable to her prior seisin, which, though it merged in the seisin of the husband during coverture, reverted to her on his death; and *Jayne v. Price* (*b*), and *Doe d. Hodsden v. Staple* (*c*), were cited. On the part of the defendant it was said, that during the short period that the lessor of the plaintiff had the possession, she acquired no title, she was a mere trespasser. After her marriage *Carr* became the trespasser, and by continuing in possession for 50 years, he acquired a title by adverse possession against the heir at law of *William Torry*. The lessor of the plaintiff had no title; there was, therefore, nothing to revest in her upon the death of her husband. The learned Judge told the jury, that the evidence of old *Torry* having left a son whose children are still alive, would put an end to the case, unless they presumed, as they were at liberty to do, that old *Torry* was only tenant for life, with remainder to his daughter in fee; and that they would perhaps infer this from the circumstance of the son's residence

Possession of land by a woman during three months, whilst she continues sole, and by her husband afterwards for 40 years, is evidence of title in the heir of the wife, sufficient to rebut the inference of seisin in the father of the wife, grounded upon his prior possession; it appearing that the son and heir of the father lived in the immediate neighbourhood during the occupation of the husband.

(a) Counsel for the plaintiff, *Clinton and Humfrey*; for the defendant, *Clarke and Fish*. (b) 5 Taunt. 326; 1 Marshall, 68. (c) 2 T. R. 684.

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in the neighbourhood. A verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, in case the Court should be of opinion that there was no room for the presumption.

*Fish* now moved accordingly. In *Jayne v. Price*, the Court of Common Pleas held, that 40 years' possession by a daughter was sufficient to rebut the presumption of a seisin in fee in the mother, arising from her prior possession; it appearing that the son and heir of the latter had for many years lived within seven miles of the property without claiming it. Here the possession of the daughter was only for a few months, a period much too short to raise any presumption in her favour, sufficient to rebut the effect of the seisin of her father. In *Allen v. Rivington* (a), where it appeared by the record of a special verdict that the plaintiff, the lessee in ejectment, had possession prior to the ouster, and no title was found for the defendant, it was held that the plaintiff was without question entitled to recover.

*Per Curiam.* We cannot assume the occupation by the husband to be adverse to the prior possession of the wife. This case, therefore, is not in substance distinguishable from *Jayne v. Price*.

Rule refused.

(a) 2 Saund. 111. To the last edition of Saunders, the learned editors have added the following note:—"See contra, Burr. 2484, *Roe v. Harvey*; 2 T. R. 749, *Doe v. Barber*. This case is evidently in direct contradiction to the well-established rule, that the plaintiff in ejectment must recover by the strength of his own title, without any regard to the weakness of the defendant's. The word eject-

ment was probably used by mistake instead of *ejectione firma*; in fact, in Siderfin's report of this case, the action is stated to be the latter." So in Adams on Ejectment, 2d edit. 32, the following note is appended to *Doe v. Barber*: "It is said in *Rivington v. Allen*, 2 Saund. 3, (111,) that if in an ejectment, it appear by the record of a special verdict that the plaintiff has a priority of posses-

sion, no title is found for the defendant, the plaintiff shall have judgment; *but this doctrine seems directly overruled by the case here cited.*" It may, however, be observed, that in *Doe d. Haldane v. Harvey*, 4 Burr. 2484, the question before the Court was, not as to the quantity or quality of the title shewn in the lessor of the plaintiff, but as to the sufficiency of the evidence of that title; which point would probably, at the present day, be decided in conformity with the judgment pronounced by *Yates, J.*, against the opinion of Lord *Mansfield*, and that of *Aston, J.* who had directed the nonsuit. It seems strange that where there was nothing to cut down a clear title in one of two several lessors of the plaintiff, except a verbal statement by a witness on cross-examination, that a conveyance had been executed to the other lessor of the plaintiff, it should be held that the plaintiff could not recover upon either demise. In *Doe d. Crisp v. Barber*, 2 T. R. 749, it was expressly found that the title connected with the possession of the lessor of the plaintiff had ceased, and therefore could not constitute a good title, either to recover in ejectment, or, as in *Frogmorton d. Fleming v. Scott*, 2 East, 467, to defend in ejectment. There does not appear, however, to be any case directly overruling *Allen*

*v. Rivington*, and deciding that a plaintiff shall not recover upon an unexplained prior possession, not in his lessor, (as the case seems to have been considered,) but in himself. The prior possession in *Allen v. Rivington* seems in reality to have been nothing more than the formal entry confessed by the defendant in the consent rule, which was certainly never entered into with the view of giving the plaintiff a right to recover in the absence of all title in his lessor. Had the objection been anticipated by the person who drew the special verdict, he would, no doubt, have stated, that, before the demise to the plaintiff, the defendant was in possession. With regard to the form of the action in *Allen v. Rivington*, it appears by the record that the plaintiff had judgment to recover his term; which he could not have upon the old writ of *ejectione firme*, as distinguished from the writ of ejectment.

A person in possession without title may maintain trespass against a wrong-doer, *Graham v. Peat*, 1 East, 244; *Chambers v. Donaldson*, 11 East, 65; *Harper v. Charlesworth*, 4 B. & C. 574. But where a party deprived of his possession, seeks to recover it in ejectment, it is competent to the defendant, though a mere wrong-doer, to shew that the right of possession is in a third person.

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DOE, on the demise of LIDGBIRD, v. BEST.

Perception by a party claiming as heir, of rent accruing due on a day preceding the payment, is not evidence of seisin on such day: still less will it support a fine levied during the period that the rent was incurring.

**EJECTMENT** for lands in Kent. At the trial before Lord *Tenterden*, C. J., at the last Maidstone assizes, it appeared that *Francis Lidgbird* died seised in fee, in October, 1820, and that the lessor of the plaintiff was descended from a brother of *Henry Lidgbird*, who was grandfather of *Francis*. In answer to this case, the defendant proved that *H. Wilding*, claiming to be heir of *Francis Lidgbird*, as descended from a sister of *Henry Lidgbird*, levied a fine with proclamation in Hilary term, 1821. All the tenants of *Francis Lidgbird*, except three, having attorned to *Wilding*, he, in April, 1821, distrained upon the three for half a year's rent, due at Lady-day, 1821. The lessor of the plaintiff asserted his title, by resisting the distress in the name of the tenants. In the course of the replevin suits, it was agreed that the rents should be paid into a banking-house to abide the event of one of those causes. At the trial of the cause at the Maidstone summer assizes 1823, the lessor of the plaintiff having failed in proving a marriage through which he claimed, a verdict was returned for the defendant, and the half year's rents which became due at Lady-day, 1821, were paid over to the executors of *Wilding*, who had died after the trial. No entry had been made to avoid the fine. The learned Judge was of opinion, upon the authority of *Townshend v. Ashe* (a), that as at the time the fine was levied, no rent had been received, and there had been no actual possession, there was no seisin to support the fine, and that *partes finis nihil habuerunt*; but gave leave to move to enter a nonsuit. A verdict having been found for the plaintiff,

Sir *J. Scarlett* now moved to enter a nonsuit agreeably to the liberty reserved. At the trial of the replevin cause, *Wilding* established his pedigree, and he afterwards re-

(a) 3 Atk. 336; 1 Vez. sen. 422; more fully 5 Cruise Dig. 3d ed. 121.

ceived the whole rent which had accrued since the death of his ancestor, as from which time he had therefore the possession. *Doe d. Osborne v. Spencer (a)*. [Little Dale, J. If there had been no decision in the replevin suit, would the five years' non-claim have been a bar? Lord Tenterden, C. J. In *Doe v. Spencer* there was actual possession.] The question is whether the payment of rent is not equivalent to actual possession. [Bayley, J. Could you at the time the fine was levied have said that *Wilding* was in possession? He had not then received rent, because his title was denied.]

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After taking time to consider whether a rule to shew cause should be granted or not, Lord TENTERDEN, C.J. delivered the judgment of the Court. The case of *Lord Townshend v. Ashe* seems to be in point. There the fine was levied in Hilary term 1733, of shares in the New River. At that time the parties had not received any profits in respect of those shares. Upon the 23rd of February, 1733, they received from the New River Company, a sum of money, which had become due on the preceding 25th of December, and they continued in the receipt of the rents until 1740. It was contended, that the money, though not received till February, being due at Christmas, the receipt should relate back to that period. Lord Hardwicke, C. said "The answer given on the plaintiff's part was, that no rent was received by the defendants till after the fines levied. This I think a full answer; for till then there could be no disseisin. The profits were in the hands of the company at the time of the fines levied, and they must be considered as received by them for the party who had right, and not for a wrongdoer. Nor can the subsequent payment have relation to the receipt before that time, for fictions and relations in law are good to support right, but not to work wrong." *Townshend v. Ashe* is an authority to shew that the payment in this case, at a subsequent period, of the rent which had become

(a) 11 East, 495.



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due at Lady-day, 1821, was no evidence of *Wilding's* seisin at the time the rent became due, still less of a seisin in Hilary term 1828. On the authority of that case, we are of opinion that when *Wilding* levied the fine, he was not seised, and that the fine was consequently no bar to the title of the lessor of the plaintiff.

Rule refused.

SANDERS, Clerk, v. MEREDITH and Wife.

Payment within 20 years, of interest accruing before 20 years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to negative a plea of *solvit post diem*.

DEBT on the bond of the defendant *Ann*, before her marriage, for 400*l.*, bearing date 2d of June, 1804. The defendants cravedoyer of the bond and condition, by which the former appeared to be the joint and several obligation of *John Woofe* and defendant *Ann*, then *Ann Woofe*, conditioned to pay 200*l.* and interest on the 2d of December, 1804. The defendants then pleaded, first, *non est factum*, and, secondly, payment by *John Woofe* before action brought. The replication denied the payment. At the trial before *Park, J.*, at the last assizes for the County of Devon (*a*), the plaintiff produced and proved the bond, on which were indorsed the following receipt and memorandum. "Exeter, August 13th, 1808. Received of the within named *John Woofe*, thirty pounds, for three years' interest on the within bond, due the 2d day of June, 1807. *Daniel Sanders*." "Memorandum, at this time the property-tax, amounting to 2*l.* 3*s.* was allowed by Mr. *Sanders*, and carried to the part discharge of another bond, dated 24th June, 1796. *Harry James*." *James*, who prepared the receipt and memorandum, and signed the latter, stated that he received 30*l.* from *John Woofe*, to pay interest on the bond, and that being directed to pay interest only, he

(*a*) Counsel for the plaintiff, *Wilde*, Serjt. and *Follett*; for the defendants, *Merewether*, Serjt. and *Rennell*.

made no demand of the bond, but that he should have required the bond to be delivered up, if his instructions had been to pay the principal. *John Woofe*, for whom the defendant *Ann* was a surety, died in insolvent circumstances in 1819. For the defendants, it was contended that these indorsements were not sufficient to shew that the bond had been a subsisting debt within 20 years, and that from the memorandum, it must be inferred that the debt had been discharged, inasmuch as the 2l. 3s. would otherwise have been set against the fourth year's interest, due 2d June, 1808, instead of being carried to a different account. The learned Judge refused to nonsuit the plaintiff, but the jury adopting this view of the case, found a verdict for the defendants. In Michaelmas term, *Merewether*, Serjt., obtained a rule *nisi* for a new trial, against which,

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*Wilde*, Serjt., and *Follett*, now shewed cause. The bond being more than 20 years old, and payable more than 20 years ago, the presumption is, that it is satisfied. And that is not a presumption which slight circumstances will rebut, *Willaume v. Gorges* (a). It can only be got over by shewing that the bond was actually an available subsisting instrument within 20 years; as by a demand within the time not objected to, a payment of principal, or a payment of interest accruing due within the time. The presumption of law is, not that the bond was paid more than 20 years ago, but that if it had been a subsisting instrument, the obligee would during the 20 years have derived some benefit from it; the contrary of which is shewn here by the memorandum. The principle is, that at some time within the 20 years the bond has been paid. If the obligee has received no payment on account of principal, if he has demanded no payment, and if he has received no benefit in the shape of interest, to account for his lying by so long, the presumption will arise. Settlement of an account current,

(a) 1 Campb. 217. And see *Colsell v. Budd*, Ibid. 27; *Newman v. Newman*, 1 Stark. N. P. C. 101.

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without noticing the bond, is sufficient to raise a presumption of payment, although within the 20 years, *Oswald v. Legh* (a). If this had been a subsisting bond at the time

(a) 1 T. R. 270. In that case, *Buller, J.* is reported to have said "It is manifest that this doctrine of 20 years' presumption, was first taken up by Lord *Hale*, who only thought it a circumstance from whence a jury might presume payment. In this he was followed by Lord *Holt*, who held that if a bond be of twenty years' standing, and no demand proved thereon, or good cause of so long forbearance shewn, on *solvit ad diem*, he should intend it paid. (*Anon.* 6 Mod. 22). This doctrine was afterwards adopted by Lord *Raymond* in the case of *Constable v. Somerset*. That was debt upon bond, where the defendant and executor cravedoyer of the bond and of the condition, which appeared to be for the payment of so much money six months after the death of the defendant's testator. The defendant in his plea, averred that the testator died on the 15th of March, 1711, and that he had paid the said sum on the 16th of March, 1711, within six months after the testator's death, and thereupon issue was joined. The defendant relied on the ground that as he, after the death of the testator his father, had an estate in the plaintiff's neighbourhood, and was constant and regular in all his payments, it should be presumed that the money was paid to the plaintiff. In answer to this objection, evidence was given of a demand of the money on the defendant himself in 1725. And the

Chief Justice said that the presumption of money having been paid which was due on bond, if it were put in suit after 20 years' standing, was not the old, but a new doctrine, which had been introduced in Lord *Hale's* time, and that he would never suffer a plaintiff to be stripped of a just debt by such a presumption as was then contended for." The opinion that Lord *Hale* was the founder of this doctrine, has been lately controverted by Mr. Wilkinson in his very able "Treatise on the Limitation of Actions." That learned writer says, (page 8,) "I have met with an early case (*Shellitoe v. Horsfall*, Clayt. 102,) in which it was ruled, not only that a bond should be intended after thirty-five years to have been paid, but it was said the usage was so in such cases; the case (which may have escaped notice) was ruled in 8 Car. 1, by *Whitfield*, Serjt. at York, (ten years after the statute 21 Jac. 1. c. 16;) it was an action of debt upon bond for 440*l.* against the defendant, as executor of one Cooper; the bond was dated 35 years since, and no suit commenced or interest paid during all this time, and for these reasons, it was held by good construction, that this bond should be intended to be paid, and the Judge said the usage was so in such cases, and the jury found accordingly. See also the early cases in Chancery, *Coles v. Emerson* 1 Chan. Rep. 42; *Geoffry v. Thorn*

of the payment in August, 1808, more than a year's interest would have been due on the bond. This would have been more than sufficient to absorb the 2*l.* 3*s.* without carrying it to the amount of the other bond.

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*Mercioether*, Serjt., contra, was stopped by the Court.

BAYLEY, J.—The rule is, that after 20 years, payment is presumed. There may be circumstances to induce a jury to presume payment within 20 years. It is, however, very desirable that juries should understand what the rule is, and that they should not be induced to break in upon that rule. In this case, on the 13th of August, 1808, *James* receives money for the purpose of making a payment, and he pays

1 Chan. Rep. 47; and Vin. Abr. tit. *Length of Time*; and *Blacket v. Wall*, in the Court of Pleas at Durham, Durham Ass. 1812, MS. where the plaintiff recovered in an action on a judgment of 48 years' standing, the defendant's great poverty being proved, and *Wood*, B. who tried the cause, refused a new trial; and see *Christopher v. Sparke*, 2 Jac. & W. 283, and *Wynn v. Waring*, (cited in *Fladong v. Winter*, 19 Vesey, jun. 196), *Duffield v. Creed*, 5 Esp. R. 52; *Cooper v. Dame Turner*, 2 Stark. 497; *Biggs v. Roberts* and another, 3 Carr. & P. 43. And see *Tidd's Practice*, 18. In *Wynne v. Waring*, the obligor in an old bond was known to have been distressed during the latter part of his life, having no property but real estates covered with mortgages, and the Master of the Rolls, having directed an action on an issue, the jury upon these and other circumstances, though fifty years had elapsed, found that the presumption of payment was rebutted.

The rule is stated thus in the Irish Statute, 8 Geo. 1. c. 4. "It may be reasonably presumed, that debts due by the space of 20 years or more, which have not been demanded, nor any suits prosecuted for the recovery thereof, by the space of 20 years past, are satisfied and paid, though no legal discharge can be proved, nor proof made of the payment," and by section 2, "if any person shall commence or prosecute any suit either at law or in equity in Ireland, for the recovery of any debt due by single bill or bond under hand and seal, or by judgment, &c. where no suit hath been prosecuted for the recovery thereof, nor any interest of money hath been paid, or other satisfaction made on account thereof, within the space of 20 years before the commencement of such suit, the defendant may plead payment." And see *Du Bellois v. Lord Waterpark*, 1 Dowl. & Ryl. 16; *Loytus v. Swift*, 7 Schoales & Lefroy, 642.

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three years' interest up to June, 1807. There only remains a broken sum amounting to 2*l.* 3*s.* *James* had not money enough in his possession to make up all the interest, which, unless the bond was discharged, was then due. It does not appear whether *Woofe* was present at this settlement or not. If *Woofe* was present, and was satisfied that the bond had been paid, he ought to have required it to be given up. If he was not present, he should have instructed *James* to get the bond delivered up. But it does not appear that then or afterwards any application was made to have the bond delivered up. It often happens that a payment is made at a place where the bond is not. In such a case, the obligee would naturally say, I will take care and send it to you. Here the bond was in the possession of the parties at the time the payment takes place. It is said that it is a strong circumstance that the 2*l.* 3*s.* was carried to another existing debt, whereas it was as easy to carry it to the account of the bond in question. There were two bond debts then due, and I do not think the fact of the plaintiff's desiring, and *James's* submitting to carry the broken sum, not amounting to half, or even a quarter of a year's interest, to the account of the other bond material. It was not a ground upon which a jury could form a safe belief that the bond was discharged. Then it is said that this is not a payment of interest accruing within 20 years, but up to June, 1807, only. I think it was an acknowledgment that it was at that period a good valid subsisting bond. This case ought to be submitted to another jury upon payment of costs. It is a very hard case upon the defendants; and it is very desirable that some arrangement should be come to between the parties.

LITLEDALE, J.—This is a case of great hardship, but the rule is to presume payment after 20 years, except where there has been an acknowledgment within that period. There is nothing here to take the case out of the general rule, but the 2*l.* 3*s.* Whether the bond of 1796 may have been paid by broken sums does not appear; as far as it

goes, it is a circumstance in favour of the defendants. But the payment in August, 1808, is a recognition that the bond was due within 20 years. *James* paid the money on account of *Woofe*, and *James* says, that he only paid interest, otherwise he should have required the bond to be delivered up. This shews the impression upon his mind that the principal was not paid. There must be a new trial upon payment of costs.

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PARKE, J.—I am of the same opinion. This bond is more than 20 years old, which circumstance raises a presumption of payment. The question is whether there has not been a clear acknowledgment within 20 years. The simple payment of interest which has accrued within 20 years, is a clear acknowledgment that the bond was unsatisfied. Payment within 20 years of interest which has accrued beyond the 20 years, is only proof that such a bond once existed. But the making of the indorsement on the bond itself, in 1808, is an admission that the debt was a valid subsisting debt within the 20 years. I rely not so much on the payment of interest as upon this circumstance. They make no demand of the bond, the bond is not delivered up; but an indorsement is made on the bond. The putting of the 2*l.* 5*s.* against the older bond, may deserve consideration, but it is not equivalent.

Rule absolute.

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BIRD v. JONES.

**ASSUMPSIT** for board and lodging for defendant's wife. Plea, non assumpsit; and issue thereon. At the trial before *Gaselee, J.*, at the last assizes for the County of Gloucester (*a*), the following facts appeared. In 1811, the de-

(*a*) Counsel for the plaintiff, *Ludlow, Serjt.*, and *Busby*; for the defendant, *Justice*.

it lies upon the plaintiff to shew what means of subsistence the wife possessed. *Qu.* Whether the necessity of this proof is dispensed with by evidence of an express promise of payment.

Where a defendant is sought to be charged with supplies furnished to his wife during his absence from England, *Qu.*

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defendant having become embarrassed in his circumstances went to Guernsey, leaving his wife and daughter in possession of some cottages, the separate property of the wife, the rental of which amounted to 50*l.* a year, but which were in a very dilapidated state. The defendant's wife supported herself and daughter at first by going out to service. In 1820, the daughter having intermarried with the plaintiff, the defendant's wife went to live with her daughter, and was supported by the plaintiff. The defendant having left Guernsey and a numerous second family, in consequence of proceedings against him there for bigamy, returned to England, where, according to the positive testimony of one witness, he stated an account with the defendant, in which his wife's board, &c. were included, and promised to pay the balance, amounting to 196*l.* On the part of the defendant it was objected, that there was no legal evidence of the first marriage. The learned Judge, however, ruled that a marriage in fact was sufficient (*a*). It was then submitted to the jury that no evidence had been given to satisfy them, that the defendant had not allowed his wife a sufficient maintenance, and that in the absence of such proof, the defendant was not liable to pay. The learned Judge told the jury that there was no evidence of the state of the defendant's property; that it was in one of the defendant's cottages that the wife of the defendant had lived with the plaintiff; that one of the witnesses had spoken to a positive promise by the defendant to pay; and he directed the jury to say whether this promise was or was not made, and

(*a*) In all personal actions, except the action of crim. con. general reputation is sufficient evidence of marriage. *Morris v. Miller*, 1 W. Bla. 632, 4 Burr. 2057; *Leader v. Barry*, 1 Esp. N. P. C. 353; *sed vide Dickenson et ux. v. Davis*, 1 Stra. 480; and see 2 Roll. Ab. 551, l. 5; *May v. May*, Bull. N. P.

112; *Hervey v. Hervey*, 2 W. Bla. 877; 1 Went. Pleading, 42; 2 Wms. Saunders, 44, c.n.; Bro. Abr. *Trial*, pl. 16; *Smith v. Huson*, 1 Phillimore, 287; *Faremouth v. Watson*, ib. 355; *Qu.* as to the proof of marriage in proceedings in dower, or where a party makes title under a marriage settlement?

to what extent. A verdict having been found for the defendant,

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*Busby* now moved for a new trial. In *Hornbuckle v. Hornbury* (a) it was ruled by Lord *Ellenborough*, that a husband, who, after allowing his wife a separate maintenance, promises to pay the amount of a debt which she contracts in a state of separation, cannot afterwards recede from his promise on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he made the promise under a misapprehension of the law (b). The case of *Holt v. Brien* (c) fully recognizes the principle laid down in *Hornbuckle v. Hornbury*; though in *Holt v. Brien* the condition not having been performed, it was held, that the plaintiff was not entitled to recover. This case is much stronger than *Hornbuckle v. Hornbury*, as there a separate maintenance was proved. Here, though the wife might have been maintained by the rent of the cottages, supposing that it was not swallowed up by the dilapidations and that she received the amount, it was not shewn that any rent was ever paid to her.

LORD TENTERDEN, C.J.—The wife maintained herself nine years, and then went to live with the plaintiff, who was her son-in-law, and when the husband returned, they tried to make him pay. It might be true that the cottages were in such a state as to be of no value, or that the rents were not in fact paid, but it did not appear that the wife was less capable of supporting herself after she went to live with the plaintiff, than she was during the nine years preceding. The promise might have made the defendant liable; but it was for the jury to say whether they believed that such a promise had in fact been made.

BAYLEY, J.—It was part of the plaintiff's case, to shew

(a) 2 Stark. N. P. C. 177. (b) *Ante*, i. 566 (f). (c) 4 Barn. & Ald. 252.



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that the wife was in such a state as to render it necessary that she should be supplied by the plaintiff. No evidence of her circumstances appears to have been given. It was for the jury to say whether they believed the witness or not.

Rule refused.

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CALVERT and another v. SUSANNAH GORDON, Executrix of the last Will and Testament of ALEXANDER GORDON, deceased.

Upon a bond conditioned for a collecting clerk's truly accounting for and paying over moneys by him received from time to time and at all times during his continuance in the service, the obligor cannot discharge himself from further liability by giving notice on a particular day that from thenceforward he will not remain surety.

*Seemle*, that such obligor must remain liable at all events during the whole period of the service.

A surety may protect himself by stipulating in the instrument of guarantee, that he shall be at liberty to determine his liability at the expiration of a specified time after notice.

Costs of a *good* jury upon execution of writ of inquiry under 8 & 9 W. 3, c. 11, not allowed, although the Judge certify that it was a proper cause to be tried by a special jury.

DEBT on bond of the testator, conditioned for the faithful service of *Richard Edwards*, as a collecting clerk to the obligees and other persons trading under the firm of *Felix Calvert and Co.*, from time to time and at all times *during his continuance in their service and employ*. Plea, that *Edwards* remained in the service of the plaintiffs and their co-partners, as such collecting clerk, from, &c. until a certain other day, to wit, 31st October, 1821, on which day and year the said testator died, and continually from thenceforth until the time of the giving of the notice hereinafter mentioned. Averment of faithful service, &c. during such continuance of the service, &c. Averment, that within a short and reasonable time in this behalf, after the death of the said testator and before the committing of any breach of the said condition, to wit, on &c., at &c., defendant, as executrix, &c., gave notice in writing to plaintiffs that she the said defendant, as such executrix, would not remain surety to, or guarantee or indemnify plaintiffs, &c., for the fidelity of or to, and faithful performance by said *Edwards* of his said duty as such collecting clerk; and so plaintiffs, if damnified, were damnified of their own wrong. The replication assigned one breach before the notice, and then,


by way of second breach, stated, that after the time of the said supposed notice, and before the day of exhibiting, &c., and whilst *Edwards* was in said service and employ as such collecting clerk as aforesaid, to wit, on &c., and on divers other days and times between that day and the said 16th day of May, 1826, divers other sums of money of and belonging to the persons for the time being carrying on, &c., amounting to a large sum, to wit, 2000*l.*, were collected by and came to the hands of *Edwards*; yet *Edwards* did not from time to time, or at any time, well and truly account for, pay, deliver over, or make good the said last mentioned sum of money, or any part thereof, unto the persons for the time being carrying on, &c., or any or either of them, although often requested so to do, but wholly omitted and neglected so to do, whereby the persons for the time being carrying on, &c., have lost and been deprived of the said last mentioned sum of money. And the said plaintiffs say, that neither testator in his life-time, nor the said defendant since his death, have nor hath either of them, nor hath said *Edwards* nor said *Kent*, (a co-surety), their or either of their heirs, &c., indemnified the persons for the time being carrying on, &c., or any or either of them, or any or either of their heirs, &c., from the said loss so occasioned by the said *Edwards* so omitting to account as aforesaid, but have wholly neglected so to do, contrary to the condition of the said writing obligatory. Verification and prayer of judgment. The rejoinder stated, that the sums mentioned in the replication as having been collected by and come to the hands of *Edwards*, were three several sums of money, to wit, one of them a large sum of money, to wit, &c., was a sum of money which at the said time, when &c., in the said replication mentioned, at &c., was collected by and came to the hands of *Edwards* from one *A.B.*; and after alleging the receipt of two other sums in the same manner, the rejoinder avers that *Edwards*, within a reasonable time afterwards, to wit, on &c., at &c., did well and truly account for, pay, &c. the said three sums

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of money unto the said persons for the time being carrying on, &c. Surrejoinder, that the said three last mentioned sums were not, nor are nor is any or either of them, the same identical sums or sum as in the said replication secondly above are mentioned, but are other and different sums, in respect whereof the said plaintiffs have assigned the said last mentioned breach of the said condition; and that the said plaintiffs have assigned the said second breach of the said condition for this, to wit, that after *Edwards* entered into, and during the time that he was in the said service and employ, and before the exhibiting, &c., and before the time of the said supposed notice, to wit, on the said 2d day of May, 1820, and on divers other days and times between that day and the said 31st day of October, 1821, divers sums of money other and different than the said three several sums in the said second rejoinder alleged to have been received and accounted for by *Edwards*, were collected by and came to the hands of the said *Edwards* as such collecting clerk as aforesaid, of and belonging to the said persons for the time being carrying on the said business of a brewer so carried on under the said firm as aforesaid; which said other and different sums of money amounted to a large sum of money, to wit, 2000*l*.: Yet the said *Edwards* did not from time to time, or at any time, well or truly account for, pay, deliver, or make good unto the said plaintiffs, or to the other persons for the time being carrying on, &c., or to any or either of them, the said last mentioned sums of money so collected by him as aforesaid, or any part thereof, although often requested so to do; and the said last mentioned sums so collected by the said *Edwards* as aforesaid, are and each of them is wholly unpaid and unsatisfied, contrary, &c.; and which last mentioned sums, so mentioned and set forth in the said breach of the said condition secondly above assigned, are and each and every of them is other and different than the said three several sums of money, and each, &c., in that behalf mentioned in that part of the said rejoinder of the

said defendant by her above pleaded to the said breach of the said condition secondly above assigned in the said replication: *And this the said plaintiffs pray may be inquired of by the country.* To this surrejoinder the defendant demurred, and the plaintiffs joined in demurrer. Upon argument (a) the Court held that the surrejoinder was good; and interlocutory judgment was signed under 8 & 9 W. 3, c. 11. Pursuant to that statute, notice of executing a writ of inquiry before the Lord Chief Justice, to assess the damages upon the breaches assigned, was given for the adjourned sittings after last Hilary term. The plaintiffs moved for and obtained a rule for a good jury on the execution of the writ; and such jury was accordingly summoned. The execution of the writ was appointed for the 21st of October, but did not take place until the 23d, when the case was called on before Lord *Tenterden*, C. J. After proceeding some way with the plaintiff's case, it was agreed that the damages should be referred to a barrister, who was to examine the accounts and certify the amount of damages upon each breach. His lordship certified that it was a proper cause to be tried by a special jury. The referee having certified that the damages upon the first breach, relating to moneys received before the giving of the notice of discontinuing the guarantee, amounted to 17*l.* 2*s.*; and upon the second breach, in respect of sums received after the notice, amounted to 1744*l.* 1*s.* 8*d.*,

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*F. Pollock* now moved in arrest of judgment. From the nature of the transaction, the obligor or his personal representative must be at liberty to discontinue the guarantee. A contrary decision would bind the surety to answer for the conduct of the clerk during the joint lives of the master and clerk, provided they continued in that relation to one another, notwithstanding any change of circumstances or conduct on the part of the clerk. It cannot but have been

(a) See the argument and judgment, *ante*, i. 497, and 7 B. & C. 808; and see the pleadings with reference to the *first* breach assigned fully stated, *ante*, i. 497.

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understood by all the parties, when they entered into this arrangement, that it was liable to be put an end to upon reasonable notice.

Lord TENTERDEN, C. J.—The only question raised by the defendant's second plea is, whether it is competent to the surety to put an end to his liability by giving a notice, which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship on the surety, if his liability must necessarily continue during the whole time that the principal remains in the service; but looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability, after a specified time after notice given. This he has not done.

Rule refused.

On the taxation of costs, the plaintiffs claimed to be allowed the sum of 12*l.* 12*s.* paid to the jury; 4*l.* 4*s.* for summoning the jury three days; the sheriff's fee of 1*l.* 1*s.*; and the expense of the motion for a good jury, and the rule thereon. All these claims were rejected by the Master, who allowed only the usual sum paid to a common jury, viz. 1*l.* 1*s.*

*Chilton* now moved for a rule to shew cause why it should not be referred back to the Master to review his taxation. In *Hamelton v. Style* (a), and *Wilks v. Eames* (b), upon consideration of the Jury Act, 3 *Geo.* 2, c. 25, s. 16, which says, that the party applying for a special jury shall be at the costs of striking the same, the Court held, that if the verdict goes on that side which moved for the special jury, the extraordinary allowance to a special jury, and all the expense that attend the actual striking, should be taxed and allowed against the losing party. The late statute, 6 *Geo.* 4, c. 50, s. 34, restrains the right to costs,

(a) 2 *Stra.* 1080.

(b) *Ibid.*

unless the Judge certifies. Here a certificate had been granted.

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*Per Curiam.* A good jury is not a special jury within the meaning of the several acts on the subject of juries; and the Master now certifies that both before and since the late statute, the practice had been invariably to disallow the extra expense of a good jury upon the execution of a writ of inquiry. Whereupon

Rule refused.

PITT, Esq. v. NEW, M. D.

THE defendant was held to bail on the following affidavit. *Joseph Pitt*, of &c., maketh oath and saith, that *John New*, of &c., is justly and truly indebted to him, this deponent, in the sum of 6,400*l.* for money paid, laid out, and expended, by this deponent, to and for the use and benefit of the said *John New*, and for money due and payable from the said *John New* to this deponent, for interest upon and for the forbearance of divers large sums of money owing from the said *John New* to this deponent, and by him, this deponent, forborne to the said *John New*, for divers long spaces of time, now elapsed, at the request of the said *John New*.

*Affidavit to hold to bail for money paid for the use and benefit of the defendant, without adding "at his request," is insufficient.*

*F. Pollock*, upon the authority of *Durnford v. Messiter* (a), obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of the county of Gloucester, as to this action, on filing common bail, on the ground of a defect in the affidavit to hold to bail, in not alleging that the money had been paid *at the defendant's request*.

*Campbell* now shewed cause. In *Durnford v. Messiter*, it was held, that an affidavit stating that the defendant was indebted to the plaintiff in 20*l.* for money advanced, laid out, expended and paid, and for goods sold and delivered by the plaintiff to and for the use of the defendant, and

(a) 5 M. & S. 446.

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also for work, labour and diligence, and for fees due and of right payable to the plaintiff as an attorney, in respect thereof, for and on the behalf of the defendant, but omitting to state that it was at the special instance and request of the defendant, was insufficient. But it does not appear from the report of that case, that the attention of the Court was called to *Eyre v. Hulton* (a) and *Bliss v. Atkins* (b). In the former of these cases, the affidavit stated that the defendant was indebted to the plaintiff in 3000*l.*, for money paid, laid out and expended by the plaintiff for the use of the defendant, without adding that it was paid at the defendant's request. And *Perks v. Severn* (c) was cited, but *Gibbs*, C. J. said, "In that case, it did not appear to whom the goods were sold; it might be a sale to the defendant, or to another for whose debt he had made himself responsible, therefore the nature of the debt did not sufficiently appear; if it had been said that the goods were sold by the plaintiff to the defendant, that would have been sufficient. If the provision now contended for was requisite in one case, it must be necessary in another. It would be impossible to expect, in the case of an action for money had and received (d), that the plaintiff should swear that it was had

(a) 5 Taunt. 704, 1 Marsh. 315.

(b) 5 Taunt. 756, 1 Marsh. 317, n.

So in *Brown v. Garnier*, 6 Taunt. 389, where the affidavit stated that the defendant was indebted to the plaintiff in 15*l.* and upwards, for the hire of divers carriages of the plaintiff, hired to and for the use of the defendant, and for work and labour done by the plaintiff for the defendant, without inserting the words "at his request," it was objected on the behalf of the defendant, that he might have had the use of the carriages, and yet not be answerable to the plaintiff unless he had contracted for them, and that he was not answerable for the work unless done upon his

retainer. But the Court there said, that "hired to the defendant" was equivalent to saying "let to hire to the defendant," and implied a contract, and that the second objection had been held to be insufficient.

(c) 7 East, 194; 3 Smith, 339.

(d) It seems probable that the learned Judge here spoke of the action for money paid, and not for money had and received, as stated in the report; for where *A.* receives money to the use of *B.* any request by either *A.* or *B.* appears to be wholly immaterial, and is never alleged even in a declaration, by the most verbose pleader. Supposing the learned Judge's observa-

and received by the defendant, to the use of the plaintiff at the defendant's request, for in far the greater number of cases, that the money is received to the plaintiff's use, is only a conclusion resulting from the construction which the plaintiff, swearing to the best of his judgment, puts upon a transaction, from which he conceives a debt to result, but no request in fact is made by the defendant." And in *Bliss v. Atkins*, that Court held an affidavit to be sufficient, which

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tions to have been meant to apply to the action for money paid, laid out and expended, the very difficulty pointed out by the learned Judge, and also in *Berry v. Fernandes*, arose in the principal case; as it appeared by the plaintiff's affidavit made in opposition to the rule, and by the subsequent proceedings at the Wilts Assizes, that the plaintiff's claim against the defendant, arose out of the liability of the latter to contribute his proportion under a bond entered into by the plaintiff, the defendant, and their late copartners, conditioned to replace 30,000*l.* stock, sold out and advanced by the obligee for the purpose of winding up a banking concern. If, in swearing that the defendant's contributive share of this 30,000*l.* had been advanced at his request, the plaintiff was to be considered as alleging a fact, such allegation would have been directly contrary to the truth; and if not, he would be swearing to an inference of law, to the correctness of which he stood already pledged, by the allegation that the defendant was indebted to the plaintiff in so much money. That the assertion of the legal result implied in the words "is justly and truly indebted" is in some cases considered sufficient, may be collected from the distinction which has been

made between an affidavit against the acceptor of a bill, or the maker of a note, and an affidavit against a party who is only collaterally liable. In the latter case, it has been held, *Davison v. March*, 1 N. R. 157, that an affidavit to hold to bail, which states the defendant to be indebted to the plaintiff as indorsee of a bill of exchange, is sufficient, without alleging the bill to have become due, on the ground that the plaintiff might be indicted for perjury if the bill was not due, inasmuch as the defendant would not in such case be indebted to the plaintiff as sworn. And in *Jackson v. Tate*, 2 M. & S. 148, an affidavit to hold to bail, stating that defendant was indebted to plaintiff in 450*l.* as indorser of a promissory note made by defendant, without shewing that the note was then payable, was held to be insufficient; and *Bayley, J.*, distinguished that case from *Davison v. March*, on the ground that there the defendant was stated to be an indorsee, and as such only a collateral security, and not indebted unless the bill had become due, and had been dishonoured, but that in *Jackson v. Tate* the defendant being the maker of the note, the affidavit that he was indebted might be true, and yet the note might not be due, because the maker of a promissory



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merely stated that the defendant was indebted to the plaintiff for work and labour done by the plaintiff for the defendant, as the servant of the defendant, without saying that the work was done at the defendant's request, or at his retainer. And in the late case of *Berry v. Fernandes (a)*, the Court of Common Pleas held that an affidavit of debt for money paid for the defendant, and money advanced to him, need not allege that this was at the request of the defendant. And though *Durnford v. Messiter* was cited in that case, the Court said that a request with respect to money paid on behalf of a defendant, is in general an inference of law, which an uninstructed person cannot be expected to swear to.

Lord TENTERDEN, C. J.—Consistently with this affidavit, money may have been paid to the use of the defendant without any authority from him. The affidavit should be such that it cannot be consistent with truth unless the plaintiff has a good cause of action; but consistently with the facts stated in this affidavit the plaintiff may not be entitled to recover. The affidavit is therefore insufficient.

Rule absolute (b).

note becomes a debtor presently, though the note be payable at a future day, being *debitum in præsentis solvendum in futuro*. The distinction thus taken in *Jackson v. Yate* was confirmed in the case of *Holcombe v. Lambkin*, 2 M. & S. 475, which was an action against the acceptor of a bill of exchange. And see *Edwards v. Dick*, 3 B. & A. 495.

(a) 1 Bingham. 338, 8 B. Moore, 332.

(b) In *Taylor v. Forbes*, 11 East, 315, 16, Lord Ellenborough says, "The strictness required in these affidavits is not only to guard defendants against perjury, but also against any misconception of the

law by those who make the affidavits. And the leaning of my mind is always to great strictness of construction, where one party is to be deprived of his liberty by the act of another." In *Macpherson v. Lovie*, 2 D. & R. 69, and 1 B. & C. 108, in delivering the judgment of the Court, Abbott, C. J., said, "The effect of the decisions upon this subject is, that the Court can take nothing by intendment upon the construction of an affidavit of this kind; and that unless the affidavit shew clearly a cause of action, the party ought not to be required to give bail." And see *Bell v. Thrupp*, 2 B. & A. 596, 1 Chit. Rep. 331.

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## ROWE, Executor of JOSHUA ROWE, v. BRENTON.

**TROVER** for copper ore, laying the conversion in the lifetime of the testator. Plea, not guilty. In Hilary term, 1825, the testator commenced an action of trover against *Brenton* the defendant, for certain quantities of copper ore raised from an estate called Lamellyn or Nansinellyn; which ore was claimed by the proprietors of a mine called the East Crinnis Mine, under a lease of copper granted by the King, as Duke of Cornwall. This action was tried at the Lent assizes for the county of Devon, in 1825, before *Park, J.*, (a) when a verdict was found for the defendant; but in the ensuing Trinity term a rule for a new trial was made absolute by this Court, on the ground that certain documents, called Assession Rolls (b), ought not to have been received in evidence by the learned Judge. The cause came on to be tried a second time before *Littledale, J.*, at the Summer assizes for the county of Devon, in 1826 (c); but after the trial had occupied two days, one of the special jurors was incapacitated by a sudden illness from continuing in the box, and the parties agreed to discharge the rest of the jury. The title of the Duke of Cornwall to copper under certain tenements in the duchy, called conventional (d) tenements, being materially implicated in this and another action of a similar kind, the officers of the duchy thought proper, upon the application of the defendant, to take upon themselves the further defence of such actions; and in Hilary term, 1827, an application was made to this Court by the then attorney-general (e), that both the actions might be tried at bar. In support of this application the attorney-general informed the Court that the

The Crown may forbid the issuing of a writ of nisi prius in any action in which the King has an interest.

A suggestion *ore tenus* by the attorney-general, that the Crown is interested in a suit depending between subject and subject, is a sufficient ground for ordering a trial at bar.

(a) Counsel for the plaintiff, *Pell* and *Wilde*, Serjts., *Erskine*, *Carter*, and *Rowe*; for the defendant, *Copley*, A.G., *Schwyn*, *Bayly*, *Tidd*, *Manning*, and *Tucker*.

(b) *Post*, 171, 179.

(c) *Wilde*, Serjt., led for the plaintiff, *Pell*, Serjt., having quitted the circuit.

(d) *Post*, 139, 143.

(e) Sir *Charles Wetherell*, Knt.

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crown was interested in the actions, and was in future to pay the costs; and he contended that, upon this suggestion made by him officially, the Court was bound to grant rules for trials at bar on the part of the defendant, without hearing cause from the plaintiff, which would leave it to the plaintiff to move to discharge such rules. In support of this position the attorney-general cited 1 Ventr. 74 (a), 2 Salk. 625 (b), 2 Stra. 816 (c), 2 Inst. 424, Reg. Brev. 186, F. N. B. 241 A., and a note from the Crown Office, of a case of *Rex v. ———*, 32 Geo. 3 (d); and though the Court seemed inclined to think that the rules should not be absolute in the first instance, yet, on taking time to look into the authorities, rules absolute were granted, Lord Tenterden, C. J., stating, that upon consulting the authorities the Court were clearly of opinion, that where the Crown is interested, the King may forbid the *nisi prius*; adding, however, that it would still be open to the plaintiff, if he should be so advised, to move to discharge the rules: and Bayley, J., said, that the writ cited in F. N. B. 241 A. from the register, could not be got over. At a subsequent day in the same term,

*Brougham* moved to discharge these rules, upon an affidavit alleging that the Crown had no immediate interest in the event of the suit, but stating that the question in the causes related to the rights of persons claiming as lessees of the Duke of Cornwall. The affidavit shews that there is no real connection between the Crown and the defendant. The Crown has no right to a trial at bar, where the King is not directly a party. The authorities cited, when the rules were obtained, from F. N. B. 241 A. and 2 Inst. 424, are merely *dicta*, and one depends on the other. Fitzherbert, who is cited by Coke, does not support Coke's *dictum*. The words of the writ are, "*specialiter nos tangat.*" *Rex v. Hales* does not militate against the plaintiff.

(a) Anon. P. 22 Car. 2.

(c) *Rex v. Hales*, M. 2 G. 2.

(b) Lord Bellamont's case, P.  
 12 W. 3.

(d) And see *Regina v. Banks*,  
 2 Salk. 651, 6 Mod. 245.

That was an *ex officio* information filed by the attorney-general; there, therefore, the Crown was a party. So in the case put of a real action. Lord *Bellamont's* case, 2 Salk. 625, cited also in Cowp. 161 (*a*), was more like this, but the report is not very clear. Supposing, however, the Crown to be entitled to the privilege now claimed, this is not the proper mode of applying. Fitzherbert mentions a claim of a trial at bar, as made by the King's special warrant. The right ought to be claimed by matter of record (*b*).

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LORD TENTERDEN, C. J.—No sufficient ground has been laid to induce the Court to discharge these rules. The attorney-general appeared personally in Court, and affirmed that the Crown had an interest. The affidavit now discloses what that interest was; it shews a real interest in the cause. F. N. B. 241 A. is sufficient authority for us.

BAYLEY, J., and HOLROYD, J., concurred.

Rule refused (*c*).

Both actions were to have been tried in Michaelmas term, 1827, but the respective plaintiffs countermanded notice of trial. Shortly afterwards the action of *Rowe v. Brenton* abated by the death of the plaintiff. Another action of trover was subsequently brought by his executor, and a similar rule having been obtained, the cause was tried at the bar of the Court in the present Michaelmas term (*d*).

(*a*) In *Fabrigas v. Mostyn*.

(*b*) Query, whether the suggestion of the attorney-general, as to the interest of the Crown, might not be put on the record? Every information purports to be a memorandum of that which is alleged *ore tenus*.

(*c*) As to the right of the Crown to interpose *pro interesse suo*, and the duty of the Judges to award execution for the King, upon a title appearing for the Crown in a suit

between subject and subject, *vide* Mann. Exch. Pract. 2d edit. Revenue Branch, 126. And as to the right of the Crown to remove such causes into the Exchequer, *vide* *ibid.* 193.

(*d*) Counsel for the plaintiff, *Brougham, Erskine, Patteson, and Follett*; for the defendants, *Wetherrell, A. G., Tindal, S. G., Sir James Scarlett, Harrison, A. G.* for the duchy, *Dampier, and Coleridge*.

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## FIRST DAY (a).

On the part of the plaintiff a single witness (*b*) was called, who proved, that from the year 1814 to the time of his death, the testator occupied an estate called Lamellyn or Nansmellyn, in the parish of St. Blazey, in the county of Cornwall, paying poor rates and other outgoings. In 1820 the testator sunk a shaft for the purpose of opening a copper mine in the lower part of Lamellyn, towards the eastern boundary. A copper lode was found; and ore was raised, and partly dressed for the market. This ore the defendant carried away in September, 1820. Upon cross-examination of the plaintiff's witness it appeared, that previously to the purchase of Lamellyn by the testator, the East Crinnis Copper Mine had been worked in land adjoining Lamellyn, the East Crinnis shaft being only 20 yards (*i.e.* perches) from the boundary of Lamellyn, and the shaft sunk by the testator being within four yards (perches) of the boundary, and descending perpendicularly upon the same lode on which the East Crinnis adventurers had been previously working. Here the plaintiff closed his *primâ facie* case. Upon which

*Wetherell*, A. G., applied for a nonsuit. The plaintiff's case is, that the testator, as superficial occupier, had a right to that which was taken up from under the soil. The East Crinnis adventurers were actually in possession of a lode within the testator's boundary at the time he sunk his shaft; which shaft appears by the evidence to have been sunk for the purpose of robbing the East Crinnis adventurers of that lode. *A.*, by grant or by custom, &c., may have a right to follow a lode under *B.*'s premises, being a bounded estate. *Non constat* that the man who has the land is not entitled also to the mines, but it lies upon him to shew it: here the plaintiff stands merely upon his

(a) Wednesday, 19 Nov. 1828.

(b) Francis Vivian, mine-captain to the testator.

testator's having been superficial owner. In a mining country, possession of the surface is not a *prima facie* title to the minerals under it. But if it were so, here it appears that another person was in possession of the lode. In point of law, there may be distinct titles to the minerals and to the surface.

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*Tindal, S. G., ad idem.* The evidence of right to the surface is extremely slender. The witness states, that in 1814 the testator bought this property; but no conveyance appears, no quantities are stated, and the mode of buying is left in the dark; no evidence of any pernancy of profits, nothing to shew whether he was a mere tenant at will or a tenant at all. In *Rowe v. Grenfell (a)*, which was an action of trover brought by the testator upon nearly the same facts which have now been proved, *Abbott, C. J.*, said that the plaintiff must be called. But upon *Pell, Serjt.*, pressing that the case might go to the jury, in order that he might have the benefit of a bill of exceptions to the direction, his lordship left it to the jury to say whether the presumption of a title to the minerals, arising from the possession of the surface, was not rebutted by the fact, that the owner of the surface had never been in the actual enjoyment of the minerals, and that these minerals, when raised by him, had been taken away by other persons. "Looking at the possession and enjoyment of the land, and at the want and absence of enjoyment of the minerals, both before and after the plaintiff became possessed of the land, it is for you to say whether he has made out, to your satisfaction, that these minerals belong to him." And a verdict was found for the defendant. The object in taking this point is not to withdraw the facts from the jury, but to compel the plaintiff to bring the facts under their inspection. If this were a question of right to the surface, the person presenting so slender a case would be nonsuited; but the right to the surface does not imply a right to the

(a) *Ryan & Moody*, 326.

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mines below, which right is frequently separated from the right to the surface; and, as far as evidence of enjoyment has gone, it is of ownership in the defendant, who was in possession of the mine before the testator began to work.

Sir *J. Scarlett, ad idem.* The plaintiff has given evidence of possession of the surface, leaving us quite in the dark whether his interest is leasehold, copyhold, or of what nature. He proves possession by the act of sinking a shaft; but by the very same kind of evidence by which he proves a possession of the surface, he establishes a possession by other persons of the mine under the surface. At the same time, therefore, that he proves a *primâ facie* title to the surface in the testator, he shows a *primâ facie* title to the minerals in other persons. These interests are in their nature separable, and may both be legal; and in the absence of any evidence to the contrary, both must be presumed to be legal. As the evidence now stands, the testator had a legal title to the surface, whilst other persons had a legal title to the minerals; and the property in the latter being the subject of the present action, the plaintiff must be nonsuited, unless he proceed to prove a title in the testator to the subsoil.

*Harrison, ad idem.* This is a bounded estate; and though the bounding applies solely to tin, that circumstance shows it to be a mining country, in which there are usages and regulations which commonly take away the mine from the owner of the soil.

The witness having been recalled, stated that the testator had taken a crop of oats from part of the estate.

LORD TENTERDEN, C. J.—We all think that this is not a case in which the Court can take upon itself to nonsuit the party. It is a question for the jury.

It was then urged by the Attorney General and Sir *J. Scarlett*, that if the plaintiff stopped here, he could not afterwards go into evidence of property, but that he would be entitled only to contradict witnesses to particular facts (*a*).

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LORD TENTERDEN, C. J.—There may be great difficulty in giving further evidence.

BAYLEY, J.—Where evidence is given on one particular point, you give the whole of your evidence upon that point.

*Wetherell*, A. G., opened the defendant's case to the jury in a speech which occupied the remainder of the first day. He stated that the defendant acted on the behalf of persons who claimed the ore in question, under a lease from the Duke of Cornwall of all minerals except gold, silver and *tin*, in the seventeen duchy manors; that this ore was raised from land forming part of an estate within the duchy manor of Tewington, held by a customary tenure called "conventionary," a tenure pervading all these manors; and that although the admissions to these estates purported that the tenants held to them and their heirs for ever according to the custom of the manor, yet that that custom was that the estate should be held from seven years to seven years renewable for ever; that the freehold was in the lord, to whom, and not to the tenants holding by this base tenure, the minerals belonged; and that agreeably to this claim the toll of copper raised from under conventionary tenements, had been received on behalf of the duke.

## SECOND DAY. (*b*)

Evidence in support of defendant's case.

The manor of Tewington, by the name of Bewintone, was proved to be ancient demesne, by shewing that it is

(*a*) See this discussion renewed on the seventh day.      (*b*) Thursday, 20 Nov. 1828.



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noticed in Domesday Book as *terra regis* (a). By the same document it appeared that Rainald held of Earl Moreton (b), (the Conqueror's half brother and Earl of Cornwall), Tremetone (c) and Calestock, and that Climstone, Henlistine, and Pennehel (d), were ancient demesne.

An examined copy of a charter of 15 *Henry 3*, was produced (e), whereby the king granted to his brother Richard (f) Earl of Poitou and Cornwall, afterwards King of the Romans, the whole county (or earldom) of Cornwall, with the stannary of Cornwall, and all mines (g) and other appurtenances of the same county (or earldom) and of the stannary aforesaid; to hold to the earl by the service of five knights' fees.

A commission in the 2d, and the inquisition under it in the 4th year of *Edward 1*, (h) were produced (i). The commission directs certain inquiries to be made, the two first of which are, how many and what demesne lands the King hath in his hands in each county, to wit, as well of ancient demesne of the Crown as of escheats and purchases; also what manors were wont to be in the hands of the King's predecessors, and who now hold the same, and by what warrant, and from what time, and by whom, and how they have been alienated. Upon the inquisition for the hundred of Powdershire, the jurors find that the manor of Tewington had been formerly the ancient demesne of the Crown, and had been given by *Henry 3* to his brother Richard.

(a) *Post*, 149.

(b) Robert Earl of Mortagne (*post*, 146, (a)) was created Earl of Cornwall in 1080. He afterwards became a monk at Bermondsey. Ordericus Vitalis in *Hist. Norm. Scriptoribus*, apud Duchesne, 821, 822; Sir R. Baker's *Chronicle*, 39; *Camd. Brit.* 14; Carew, 78, b.

(c) As to the septennial tenure in Trematon, *vide* Appendix, A.

(d) Now called Climsland, Helston, and Penlyn.

(e) From the Tower.

(f) As to this prince, *vide* Appendix, B.

(g) As there were open mines at the time of the grant, the introduction of this word does not appear to be material to the present inquiry.

(h) These inquisitions were taken by virtue of a special commission of *Ed. 1*, directed to commissioners throughout the kingdom, ordering them to inquire by the *oath* of jurors in every county.

(i) From the Hundred Rolls, in the Chapter House, Westminster.

They also find that the manors of Moresk and Tibeste escheated to *Henry 3*, and were granted by him to Earl Richard; that Robert de Cardinan (*a*) held Restormel in chief of *Henry 3*, and that it is now held by the Earl of Cornwall; that John de Beaupré now holds Penalyn; that Tywarnhail is held by Henry de Tyas (*b*) of the Earl of Cornwall, which Wallerand de Tyes held of *Henry 3*; that *Henry 3* had given to Earl Richard Clymesland and Rellaton; that Roger de Valletort had given to Earl Richard the castle and manor of Trematon, to be holden in chief of the King of England; that Valletort (*c*) had given the manor of Calestock to Earl Richard, who had given the same to Oxtan and wife for life; that *Henry 3* had given the manor and town of Liskeret to Earl Richard; that the manor of Penmayn was an escheat of *Henry 3*, by reason of being land of Normans (*d*), and that King *Henry 3* gave the same manor to his brother Richard, and that the same is now held by Earl Edmund.

A search was proved to have been made at the Record Office in the Tower, for the inquisition taken after the death of Edmund, Earl of Cornwall, but it was not found there (*e*).

(*a*) Robertus de Cardinan, (*post*, 146,) debet x marcas pro habendo foro apud *Lostwetell*, (*post*, 151,) *Mag. Rot. 6 Ric. 1*, Madox, 274.

(*b*) Half the manor of Tywarnhaile now belongs to the duchy. The other moiety is called the manor of Tywarnhaile-Tyas.

(*c*) It appeared that the manors granted by Valletort to Earl Richard in tail had been in the Crown, but it did not appear how they became the property of the Valletorts. Earl Edmund, the son of Richard, died without issue. The manors, however, remained in the earldom, and Lord *Hale*, who mentions the inquisition on Earl Edmund's death, (*de portubus maris* 56,) supposes that Earl Richard,

after having had issue, and before the statute *de donis*, had alienated them. It seems that Lord *Hale* did not know that they had belonged to the Crown, and was not aware of the inquisition on the death of Edmund, noticed hereafter, in which it appears that Earl Edmund died seised in tail.

(*d*) As to this cause of forfeiture, see Bracton, lib. 3, tract. 2, cap. 1, fol. 116; Britton, cap. 18; 17 *E. 2*, de Prærogativâ Regis, c. 12; *Calvin's case*, 7 Co. Rep. 20, b.

(*e*) This inquisition, which had been produced at the former trial, had become illegible. Lord *Hale* mentions it *loco citato*. A correct abstract of this record will be found in the Appendix, C.

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The following secondary evidence was received without objection:—A petition of right (a) in 9 *Ed. 2*, was produced from the records of the King's Bench. This petition was brought by the heirs of Valletort (in the nature of a *formedon* in the reverter) to recover from the Crown the manors of Trematon and Calistoke. The proceeding originated in Parliament, whence the petition was sent by the King into the King's Bench for inquiry. The suit terminated in an agreement between the King and the suppliants, to whom the King secured 40*l.* a year, until lands of equal value should be granted to them. In the course of this proceeding the Court of K. B. request the Chancellor to certify to them the inquisitions taken on the deaths of Earl Richard and of Earl Edmund his son. The Chancellor answers that he cannot find the *inquisitio post mortem Ricardi*, but he certifies the *inquisitio post mortem Edmundi*, which is set out in *hæc verba* on the record, by which it is found that Earl Edmund held in his demesne as of fee, on the day on which he died, the castle and town of Restormel, the borough of Lostwithiel, the Castle of Tyntagel, the manor of Bossynny, the borough of Tyntagel, the manor of Clymeslond, the manor and borough of Helleston in Kerrieth, the manor of Helleston in Tregashire with the borough of Camelford and hamlet of Penmayn, the manor with the borough of Leskereth, the manor of Tibest with the borough of Pons-mur (b), the manor of Penkenneth, certain tenements in Talskedy, the manor of Tywarnail, the manor of Tewington, the manor of Penlyn, the manor of Moreske, the manor of Rellaton, and certain hundreds, with the issues of mines of tin, wreck of the sea, prisage of wine; and that the said earl held in his demesne, as of fee tail, the castle and town of Trematon with the borough of Aishe (c), and the manor of Calistoke, of the gift of *Roger de Valletort* to *Earl Richard* and the heirs of his

(a) As to suits against the Crown by petition of right, see Mann. Exch. Pract. 2d edit. 84.

(b) Grampound, formerly Graunt-pount, q. d. Grand pont.

(c) Now called Saltash.

body; and that the King was heir to *Earl Edmund* (a). The inquisition then sets out the particulars of each manor, with the proceeds. The witness being directed to turn to the first, viz. the manor of Restormel, and to read what was therein contained respecting the conventionary tenants (b),

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*Brougham* objected, that the defendant was not in a condition to give evidence respecting any other property than that of the testator. Nothing has been shewn to connect the testator with any manor. He is not therefore to be affected with evidence respecting even the manor of Tewington. But supposing the connection of the testator with Tewington manor to be shewn, the defendant is not entitled to give evidence as to another manor (c). To bring himself within the case assumed upon this point, it is incumbent on the defendant to shew a common nature in respect of tenure, that

Upon a question as to the right of the lord of a manor to minerals under lands held by a peculiar customary tenure, and denominated "conventionary tenements," it is competent to the lord to prove the existence of customary estates bearing the same denomination in other manors.

(a) Co. Litt. 370 b.

(b) Called in law French, *covenauceries*, in the Latin records, *tenentes in conventione*, or *per conventionem*.

And see *Institutions convenancières des domaines congéables suivant les usemens de Bretagne*, par Baudouin de Maisonblanche, (*Saint Brieux*, 1776); *L'Usement du comté de Cornouailles*, par Furic, (*Paris*, 1644; *Rennes*, 1664) These domaines congéables appear to have been peculiar to the Armorican (or Cornish) part of Brittany, (la Basse Bretagne,) and, as the term imports, were estates from which the lords might evict their tenants (upon certain terms) on giving them notice to quit (congé). The "conventionary" interest of the tenants appears to have been considered as an impure freehold, "fief bâtarde," the seisin remaining in the lord. See *Ferriere*, (*Dictionnaire du Droit*, in verbo,) who refers to Article 541 of the Cou-

tume de Bretagne, M. de Perchambaut, sur cet Article, and to Belordeau, lettre D, Article 29.

The following works, noticed by Camus and Dupin, appear to correspond with the references of *Ferriere*:—*Commentaire sur la coutume de Bretagne*, par René de la Bigotiere, seigneur de Perchambault, Rennes, 1693, 1702; *Coutumes generales des pays et duchés de Bretagne*, avec la paraphrase de P. Belordeau, sur les coutumes et les usances de plusieurs lieux. (*Paris*, 1624, 1628, 1634, 1635, 1643; *Rennes*, 1656, 1674.) Dupin says, the *Rennes* editions are the most esteemed.

The county of Cornouailles, in Brittany, was a small district, of which Quimper was the capital, constituting the diocese of the Bishop of Quimper. (See *Dictionn. de Trévoux*, verbo *Cornouailles*.)

(c) See *Furneaux v. Hutchins*, Cowp. 807.

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these manors are strictly the same sort in point of tenure, and come under the same class as to tenant-right. The principle of *Duke of Somerset v. France*(a), that there was a distinct set of manors, all of the same nature, and subject to border law, and it was in this view that Lord Kenyon, in *Roe v. Parker* (b), and Lord Ellenborough, in *Stanley v. White*(c), refer to it. In *Ruding v. Newell*(d) Lord Hardwicke expressly confines it to those northern manors. He says this evidence has never been allowed except in the north of England, where the customs are considered as border law. There is a case indeed, in which Lord Hardwicke appears to have been disposed to extend the principle to other cases. In *Dean and Chapter of Ely v. Warren* (e) it is said that "in mine counties, Derbyshire, &c. the Courts of law have admitted evidence with regard to profits of mines, &c. out of other manors, where they are analogous and similar, to explain or corroborate the customs of the manor in question." And there he puts it on the ground of the question being one respecting the right of tenants in fenny countries to cut turf. He says "this is a fen country which is of very large extent, and the nature of fens," not of the law respecting the manors in which fens lie, but the nature of fens, "is pretty much the same throughout England." In *Duke of Somerset v. France*, Lord Raymond and one of the two puisne judges were clearly against the admission of the evidence. The other doubted; and it was upon the assertion of Mr. Lutwyche and Mr. Serjt. Wynn, that such evidence had been received on the Northern Circuit, that the Judges received the evidence against their own opinion, and the Judges of the other Courts were clearly against its admission. The principal ground stated for the reception of the evidence was, that the manors were originally parcel of one earldom (f) under one earl, where all had belonged to one earl time out of mind; that this earl might be supposed

(a) 1 Stra. 654; Fortesc. 41.

(d) 2 Stra. 957.

(b) 5 T. R. 26.

(e) 2 Atk. 189.

(c) 14 East, 332.

(f) *Vide post*, 145 (u), 148.

to have granted to the one, what he granted to the other; that thus the same custom had arisen in both, by grants before time of memory; or that if it had arisen in the one by encroachments it might also in the other. These northern tenant-right manors are all of the same description in the main particulars. They contain two classes of tenants. In one, the customary estate of inheritance is granted to the tenant, his heirs and assigns for ever, according to the custom. In the other class, the estate is held by the tenant during the joint lives of lord and tenant, according to the custom. In all these manors, the features of manorial law are precisely the same, especially with respect to succession and to the exclusion of coparcenary. [*Littledale, J.* The customs are very different in those manors.] Where the evidence has been admitted, the custom has been the same. These manors were formerly possessed by the same persons, and they are stated to have been parcel of the same earldom in the Saxon times (a). In the present case the manors appear to have no feature or quality in common beyond the mere fact of their being all locally situated in Cornwall. It is true that they are now all held of the same lord; but that has arisen since the time of legal memory; for the earliest grant in evidence with reference to this subject is that in 15 *Henry 3.* It is not incumbent on the plaintiff to prove that these manors differ in their customs or tenure, in order to negative the supposition that they are under the same general law, or to shew that within time of memory they have been held of different lords. It does, however, already appear that these manors differed in several respects. Some of these manors are ancient demesne, others not. Two come by feoffment from Roger de Valletort to Earl Richard since time of memory. [*Lord Tenterden, C. J.* The defendant says that these two manors were part of the possession of the Earl of Moreton, derived from the Crown. By

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(a) Query, whether this supposed Northumberland, within which the earldom is not the *kingdom* of four northern counties lay.

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Domesday Book, it appears that they were part of the possessions of the Earl of Moreton (a); and Valletort must have derived his title from him.] It appeared from the Hundred Rolls that Cardinan held in chief of Henry 3 seventy one fees, whereof the Earl of Cornwall then held Restormiel, by conveyance from Isolda de Cardinan.

*Erskine, ad idem.* The cases referred to go upon this principle, that it being admitted that the tenure of the tenants of all the manors is the same, if you want to enquire into an incident to that tenure in a particular manor, as to which incident no facts appear to have arisen within the manor itself, you may advert to the other manors in which those facts have arisen. In *Duke of Somerset v. France* all the tenant-right estates were admitted to be the same in point of tenure, and the question was whether a fine was payable or not. Here the question is, not what are the incidents in certain manors, they being admitted to be the same in all the manors, but what is the tenure by which the tenants hold. It is not shewn what is the tenure by which the tenants in Tewington hold. It is not proved that these manors were held under the same lord (b) before time of memory to raise an inference of identity of tenure. It is not shewn that they were held under any law analogous to the border law; nor are they in any way proved to be of the same tenure. Before the defendant can give evidence of what takes place in other manors, the tenure must be shewn to be the same.

*Patteson, ad idem.* The case of the *Duke of Somerset v. France* appears to have been decided against the opinion of the Judges upon the authority of a case in *Keble* (c), and the statement of certain gentlemen from the Northern Cir-

(a) Comes Moritoniz, (Mortagne in Normandy,) sometimes called Earl of Morteyn; and see *ante*, 140, (b).

(b) Identity of tenure within different manors appears rather to be

a consequence of the manors being held by the same lord, than under the same lord paramount.

(c) *Champion v. Atkinson*, 3 Keb. 90.

cuit. *Champion v. Atkinson* cited there was a trial at bar, as to the custom of Lady Price's manor of Westwood, whether a fine on the tenant's or lord's death was due to the heirs or successors of the lord during the infancy of the heir. "The defendant offered to shew that other manors adjoining had the same custom not to pay till age; which, per Curiam, is good, and was allowed of copyhold entailed in manors of Thistleworth and Hammersmith in Middlesex, and the Dropping and Gresham (a) fines being all one promiscuous, the verdict was for the defendant." The words of this report by no means shew that the evidence was admitted, but that the custom was good. This case seems to have been considered as a decision in point by the Court in *Duke of Somerset v. France*; but the report is too loosely worded for us to ascertain what the Court determined in *Champion v. Atkinson*. But supposing it to be a decision, it comes within the same class of tenant-right as the manors in the three northern counties. It is said that these manors were held in former times as one earldom, (which is stated by *Fortescue, J.*, as the ground of the decision), and that the same custom prevailed throughout the entire district. This appears to be the ground of the decision; and it is incumbent on the defendant, first, by evidence extrinsic of the manor of Restormel, and applying to the manor of Tewington, to shew the tenure in the manor of Tewington, and then, if he can, to shew the tenure in the manor of Restormel to be the same. That may let in some question of incident in the manor of Restormel; but he is not entitled, first to give evidence of the custom of Restormel, and then to shew that it is the same in Tewington. It appears clearly that the tenures in Restormel and Tewington are not the same, unless it be said that a tenure in ancient demesne can be the same as tenure not in ancient demesne (b). That single circumstance would differ this case from *Duke of Somerset v. France* and the other cases which have been decided

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(a) Qy. "Grassum"?

(b) *Vide ante*, 140, *post*.



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upon its authority; for the tenure has always been taken to be the same. In some cases, the tenure was in the same person time out of mind; but here it is clear that since the time of memory these manors were not in the Crown; and that they were not in the Crown before the time of memory may be inferred from the circumstance of some of them being granted by a subject to the Earl of Cornwall shortly after time of memory. *Lowther v. Raw (a)* was the case of a bill in equity, respecting the custom of a tenant-right estate in Westmoreland, held for the joint lives of lord and tenant. In the bill, they set out several customs in the manor respecting general fines, and alleged that they were payable in all the customary manors in Westmoreland and Cumberland. They attempted to give in evidence certain indentures between the lords of several customary manors and the tenants. These *Talbot, C.* refused to receive; but upon appeal to the House of Lords, the decree was reversed on the authority of *Duke of Somerset v. France*. In no other case has it been carried so far that the particular facts of any manor, or the indentures of the lords of those manors, have been received in evidence against the tenants of another manor; but the House of Lords thought that *Talbot, C.* ought to have received the evidence, inasmuch as it was parcel of the same earldom (*b*). The defendant has not brought himself within that predicament; he has not shewn that these manors were parcel of the same earldom, or that the estates are held by the same tenure.

*Follett, ad idem.* This class of cases whenever mentioned, and whenever alluded to by the bench, has been spoken of as of doubtful authority. But in those cases it was admitted that the tenure of the manors was the same. I do not understand the word "tenure" in precisely the way in which it has been used. I understand it to mean not the

(a) Fortescue, 44.

(b) As to this supposed earldom, *vide ante*, 144, 145, (a), *post*.

tenure of the manor, but the tenure of the tenants. In all the northern manors, the tenants were stated to hold for the joint lives of lord and tenant, and in all the cases the question was, whether fines were payable on the death of the lord. Assuming that the tenure of the tenants was the same in all the manors, then the question would be, if it has not occurred in this manor, how it is in other manors where the tenure is the same. If the defendant is going into evidence of tenure in other manors, he should first prove by what tenure the tenants of Tewington hold. After proving the tenure to be the same in all, he might go into evidence of the particular custom in the other manors. But here the evidence is offered for the purpose of shewing the tenure itself, which is contrary to the doctrine laid down in the cases relied on. With respect to one custom pervading all these manors, nothing is proved from which that inference can be drawn. The evidence is, that since time of memory they were not in the same hands, or held of the same lord. Tewington is ancient demesne, (*terra regis*,) and the customs of manors in ancient demesne differ materially from those of other manors. Restormel, though so contended on the other side, is not ancient demesne. Restormel is stated in Domesday to be holden by the Earl of Moreton of the King. All lands were holden of the King; for after the Conquest William granted all the lands to be holden of him; but it does not appear that this manor was the demesne of the Crown. In the ordinary signification of the word, William the Conqueror grants it to the Earl of Moreton, to be held *in capite*. It gets into Roger de Valletort, by whom it is granted to Richard, King of the Romans, in tail; and, on the failure of issue, it ought to have reverted to Roger de Valletort. It is therefore clear that those manors were not held in the same manner, and that they did not form one class of manors before legal memory. On this ground also the defendant cannot go into any evidence of the customs of other manors, for the customs, to be valid, must have existed before memory. Tewington continued in the Crown

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down to the creation of the dukedom. The strong point is, that the defendant should prove the tenure of the tenants to be the same, before he can give any evidence touching the holding of the tenants in the other manors.


After hearing the Attorney General shortly in reply,

LORD TENTERDEN, C. J.—It appears to me, and my learned brothers concur with me in thinking, that at present the objection is premature. I collect from the opening of the Attorney General that he proposes to shew that there exists in several manors, now parcel of the Duchy of Cornwall, and did exist from very ancient times, a certain class of persons now called conventional tenants, and to shew by evidence or by argument, that with regard to that class of persons, in all the different manors in which they are found, the lord of the soil is entitled to the minerals, and not the tenant. Now it does not at all follow that because he can shew that there existed in different manors persons called conventional tenants, he will afterwards be at liberty to draw his inference either by evidence or by argument. That question is yet open to us. But if we exclude the evidence that there existed this class of persons in different manors, we prevent his proceeding further, and no question can arise. It appears to me, therefore, that the objection is premature, and that we must allow the defendants to prove that there existed this class of persons. What the consequence of that may be, will be a question by and by.

The reading of extracts from the *inquisitio post mortem comitis Edmundi*, so certified, then proceeded.

“Restormel, with the town and castle.—And there are two conventional tenants who hold one ferling and a half of land, and render yearly 9s. 4d. at the four principal terms; and each of them shall come to the lord's chace in the park once in the year; and their works are worth 2d. Also there are 13 villeins, who hold in villenage 13 ferlings of land, and they render by the year at the four terms aforesaid 77s. 1d.

And every of them shall come to the lord's chace in the park once in the year; and those works are worth 13*d*. And the *chevagium* (a) *garcionum* (b) there is worth by the year 9*d*. The pleas and perquisites of the court there are worth by the year 5*s*. Sum, 10*l*. 2*s*."

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"Lostwithiel.—There are in the borough aforesaid 305 burgages, which render by the year, at the feast of St. Michael, 8*l*. 13*s*. 3½*d*." (No conventionaries mentioned.)

"Castle with the borough of Tyntagel and manor of Bos-sinny.—There are there 14 (c) free tenants, who render by the year for rent certain 20*s*. 8½*d*. and for berbiage 2*s*. 10*d*. at the feast, &c. Also there are 14 conventional tenants, who hold eight Cornish acres (d) and one ferling of land, and render by the year 112*s*. 1½*d*. at &c. And there are 38 villeins, who hold 20 Cornish acres and one ferling of land,

(a) Cum vagantes fuerint, (servi,) sicut mercatores vel mercenarii, certis temporibus *chevagium* solvunt, (quod dicitur recognitio in signum subjectionis et dominii de capite suo,) et quamdiu *chevagium* solverint, dicuntur esse sub potestate dominorum, nec solvitur dominica potestas. Bract. lib. 1, cap. 10. num. 3.

(b) "Garcio," "Ducunge," "Famulus." In the Supplement "Garcio." "Qui artifice operam suam locat." And a passage is quoted, "Ascendit plumbarius ecclesiam cum duobus *garcionibus* suis," &c. Combining this with the explanation in the preceding note, it would appear that "*chevagium garcionum*" was a small personal acknowledgment paid to the lord by such villeins as were permitted to travel in search of employment.

(c) The inquisition specifies what the free tenants "render," and what the conventionaries "hold." The

lands held by the former not being parcel of the manor, though dependent on it for the purposes of distress and escheat, were not the subject of inquiry; but with respect to lands within and parcel of the manor, the land itself was the principal, and the rents the accessory or incident, whether fluctuating or permanent. *Et vide post*, 170, 1.

(d) The Cornish acre is differently reckoned by different persons, but the true quantity seems to be 270 English acres; though in Tewington the contents of the acre appears to have been less. Carew states that 30 customary acres make a farthing (or ferling) of land, and 9 ferlings 1 Cornish acre, and 4 acres a knight's fee. And see Testa de Nevill, 504; Co. Litt. 5b. It is frequently stated in the assession rolls that the tenants in *conventionem* hold a certain number of English acres in a certain fraction of a Cornish acre.

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and are worth by the year with landyok (a) 14*l.* 9*s.* 7½*d.* Sum, 39*l.* 13*s.* 10*d.*"

"Manor of the borough of Helleston in Kerrier.—There are there 18 free tenants, who render yearly at &c. 50*s.* 4*d.* and for berbiage (b) at Easter 7*s.* And there are 76 conventionaries, who hold 28 Cornish acres and one half ferling, and 28 parcels, and render yearly at &c. 26*l.* 10*s.* 10*d.* and there are 11 villeins, who hold 4½ acres Cornish, and one croft, and render yearly at &c. 77*s.* 8*d.* And the *chevagium garcionum* (c) is worth by the year 2*s.*, and the toll of tin there is worth yearly 12*d.* The pleas and perquisites of the Court of the manor aforesaid are worth by the year 40*s.* Also the burgesses of the borough of Helleston in Kerrier render yearly for fee farm 6*l.* 13*s.* 4*d.* at two terms, &c. for the borough aforesaid. Sum, 51*l.* 6*s.*"

"Manor of Clymmesland.—There are 12 free tenants, who render by the year at the four &c. 54*s.* There are there 23 conventional tenants, who hold six and half acres and one half ferling eight landyok and one plot, Cornish, and render by the year 56*s.* 8½*d.* at &c., and of berbiage 8*d.* at &c. And there are 81 villeins, who hold in villenage 37 acres one ferling and the third part of one ferling of land, Cornish, and 11 landyok, and render by the year 10*l.* 5*s.* 8½*d.* at &c., and for berbiage 70*s.* 3½*d.* at &c. Sum, 25*l.* 10*s.* 2½*d.*"

"Manor of Helleston in Tregashire, with the borough of Camelford and the hamlet of Penmayn. There are there and in the hamlet of Penmayn 39 free tenants, who render &c. And for aid of the same, 2*s.* 11*d.* at &c. And Stephen de Trewerne holds by deed three watermills at fee farm; and he renders therefore by the year 6*l.* 13*s.* 4*d.* at &c. And there are there 33 conventional tenants, who hold 10 acres, &c. and they render by the year 9*l.* 14*s.* And there are there and in the hamlet aforesaid 78 villeins,

(a) *Quære.*

(b) *Berbiagium* (Gallis, *Brebiage*)  
 Tributum, ex herbicibus seu ovibus.—Ducange; who gives extracts

from charters of Geoffrey Count of Anjou, and of Philip King of France, in which this privilege was granted.

(c) *Ante*, 151, (a), (b).

who hold 38 acres, &c. and render &c. at &c. And there is at Penmayn a certain ferry, which is worth by the year 10s. (a). And also there are there 62 burgesses, who hold 62 burgages, and render by the year 4l. 4s. 4½d. Sum, 61l. 2s. 3d."

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"Manor with the borough of Liskereth.—There are there 24 free tenants in socage, and they render &c. And there are 41 conventional tenants, who hold 18 acres &c. and render yearly 8l. 4s. 8½d., and for aid of the same, and of the villeins at &c. 50s. And of berbiage of the same; and of villeins, at Easter, 13s. 3d. And there are there 6 villeins, who hold 17 acres, &c. and render yearly 108s. 7½d. at &c. And the burgesses of the borough of Liskereth for the farm of the borough 18l. at &c. The same burgesses render for a certain burgage thereof, each at 2s. 6d. at &c. Sum, 43l. 19s. 11½."

"Manor of Tibeste with the borough of Ponsmur (Gram-pound).—There are there 22 free tenants, who render yearly for rent service, &c. 65l. 5s.; and for aid of the same, at &c. 7s. 8d.; and for berbiage of the same 5d.; and there are there 28 conventional tenants, who hold &c. and render &c.; and there are there 21 villeins, who hold &c. and render &c.; and for aid of the same &c."

"Manor of Penkenegh.—There are there 7 free tenants, who render &c.; and there are there 9 conventional tenants, who hold &c. and render &c.; and there are there 6 villeins."

"Certain tenements in Talskedy.—There are there 2 conventional tenants and 1 villein, who hold 3 Cornish acres, and render &c."

"Manor of Tywernail.—There are there 12 conventional tenants, who hold &c. and render &c.; and there are there 15 villeins."

"Manor of Tewynton.—There are there two watermills, and they are worth by the year 56s. 8d.; and the pasture in Wallan is worth by the year 22s. 11d.; and there is there a

(a) *Vide Pcter v. Kendall*, 6 B. & C. 703.

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certain wood, the profits whereof, as in berbiage, pannage, and honey, are worth by the year 6s. 6d.; and a certain fishery there is worth by the year 4s.; and turbary there is worth by the year 18s.; and the toll of tin there is worth by the year 6s.; and there are there 18 free tenants, who render by the year for rent certain and for their works 8*l.* 9s. 4½*d.* at the four principal terms of the year; and there are there 43 conventional tenants, who hold fifteen acres and the sixth part of one ferling of land, Cornish, and render by the year, at the four principal terms of the year, for rent, (*certain*) works, and fines of tin, 13*l.* 11s. 2*d.*; and there are 11 villeins, who hold in villenage three acres and a half of land, Cornish, and render by the year, at the aforesaid terms, 4*l.* and 22*d.*; and for berbiage of the same 14s. 7*d.* at the same terms; and the rent of the bede (*a*) of the mill there of Pentewyn is worth by the year 9*d.*; and the chevage (*b*) of villeins there is worth 5*d.*; and there are there certain wastes in Wallan, which are worth by the year 61s.; the pleas and perquisites of Courts there are worth by the year 50s. Sum, 37*l.* 16s. 8½*d.*"

"Manor of Penlyn.—There are 6 free tenants, 22 conventional tenants, and 2 villeins."

"Manor of Moreske.—There are there 20 free tenants, 20 conventional tenants, and 19 villeins. And there is one carucate of land in demesne, which contains 120½ acres, which is let to farm to conventional tenants and villeins, rendering therefore by the year 64s. 6*d.*"

The next document produced was a charter (*c*), 1 *Edw.* 2, to Piers de Gaveston, granting to him the whole county of Cornwall, with the castles, towns, manors, &c.; and also the office of sheriff of the said county, the stannary, and all mines of tin and lead, which were of Edmund, late Earl of Cornwall; *habendum* to Gaveston and his heirs; *tenendum* of us and our heirs; as entirely as the said Edmund held the same on the day of his death.

(*a*) *Quare.*

(*b*) *Ante*, 151, 2.

(*c*) From the Tower.

A similar grant, 3 *Ed.* 2, to Gaveston and Margaret his wife, widow of Earl Edmund.

A grant, 11 *Ed.* 2, (a) by which it appeared that the King had granted to his Queen Isabel, during pleasure, the shrievalty of Cornwall, and all the castles, manors, &c., in the said county of Cornwall.

10th October, 5 *Ed.* 3, grant to John of Eltham, Earl of Cornwall, of divers castles, manors, &c., value 2000 marks by the year; and also Tyntagel, Clymmesland, Tybeste, Restormel, Tewynton, Tremeton, Helleston in Kyrier, Moreske, Towarnail, Pengneth, Penlyn, Launceston, Relaton, Helleston in Trigg, Lyskyret, Calistoke, and Tal-skydi, in tail; with a command to William Bottereux, steward of Cornwall, to deliver seisin of those 17 manors to the earl or his attorney; with a mandate to the knights, in the nature of a writ of assistance, purporting that it was commanded to the knights, free men, and all other tenants of castles, boroughs, and manors aforesaid, that they should be attendant and respondent to the same Earl for their homages, fealties, and other services, by reason of the castles, boroughs, and manors aforesaid (b).

Three charters of *Edward* 3 to the Black Prince, dated 11 *Ed.* 3, were read, from which it appeared that the King had created his son Duke of Cornwall, granting to him, *inter alia*, the castle of Launceston and the 17 manors, with the stannary and coinage of the same, and all the King's fees, with returns of writs in all the Duke's lands in the said county, &c. &c. (c).

Charter of 50 *Ed.* 3, creating Richard Prince of Wales, Duke of Cornwall, with the vacations of bishoprics and advowsons of cathedrals, also the stannary and coinage of the same, with issues of the Courts of the stannaries and of mines in the said counties.

An account of William de Cusance (d), 10 & 11 *Edw.* 3,

(a) From the Tower.

(b) *Vide post*, 155, (a).

(c) See the charter of creation, *post*, Appendix, D.

(d) William de Cusance was clerk of the wardrobe, 15 *Edw.* 2.

*Vide* Madox, Exch.

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was produced (a), in which was the following passage: "and of the issues of the manor of Tyntagel, &c., from the aforesaid feast of St. Michael, in the said 10th year, until the eve of St. Michael next following." "But he does not answer for any rents or farms of the said tenements of the same term of St. Michael, nor of the profits of turbary, &c. within the time aforesaid; but the Duke of Cornwall had the tenements aforesaid of the gift of the King, and took seisin thereof in the months of April and May, and has collected and retained to his own use all the rent and farms of the aforesaid tenements, which by any colour were payable on the same last term of St. Michael, as well, to wit, farms demised by the same *custos* and his ministers, and the rents and farms of conventionaries, as others whomsoever, with all profits of turbary, &c. made in the same this year." For this a writ was directed to the auditors of this account, commanding them to allow to Cusance the rents, &c., so received by the Duke.

A document from the office of the Duchy of Cornwall, purporting to be a caption of seisin to the use of the Duke, by persons assigned by his letters-patent to receive seisin, is receivable in evidence as a public instrument.

The caption of seisin under the grant to the Black Prince was then offered to be read as evidence that possession was given to him of manors containing three species of tenants (b).

*Brougham.* The plaintiff is ready to admit that the Duke had seisin under the charter, but we object to the admission of the document in evidence. It is merely a survey made under a letter of attorney from the Duke of Cornwall, to ascertain and enumerate the particulars of

(a) From the King's Remembrancer's Office, stated by the witness, Mr. *Illingworth*, to be the proper depository of accounts rendered by the ministers of the King's revenue.

(b) This caption appears to have been offered not only to shew that the Duke had seisin of the duchy at the time stated, but also of what he so had seisin. The caption is

a roll in very perfect preservation, purporting to contain an accurate account of all the manors, boroughs, castles, villeins and chattels, &c. in Cornwall, belonging to the Duke of Cornwall, and of all the claims of the burgesses, the customs of the tenants, and lists of the *liberè tenentes*, and of those who held *in liberà conventionione* and *in nativà conventionione*.

the property of which he had seisin. The document is therefore not evidence in itself for the Duke of Cornwall, although it might be evidence for persons claiming adversely to him. Nor is it rendered admissible by the minister's account, 10 & 11 *Edw.* 3; for though the minister debits himself in that account with moneys received, it is not evidence of the distinct transaction to which he chooses to refer. If a man in his account says, I received 5*l.* on a transaction stated in a letter written by *A.* to *B.*, such a reference will not make the letter receivable in evidence. This is hardly so much, the reference being not to the caption of seisin, but to what the Duke had subsequently done.

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*Erskine, ad idem.* This is not a public document executed for any public purpose. If it had been executed for any purpose of the Crown, that would make it evidence; but this appears to have been something done under a commission, or a letter from the Duke of Cornwall, who, though the highest subject, was still but a subject. The public had no interest in his acts, nor in the facts stated in this document. The return to this commission, or letter, stands in the same predicament as an answer to the letter of any private individual. This is proposed to be read for the purpose of proving the circumstances belonging to a particular manor, for which purpose it cannot be evidence against strangers. The return is neither sealed nor signed.

*Patteson, ad idem.* This return cannot affect tenants who have no opportunity of being heard or objecting to it.

*Wetherell, A. G., contra.* This document comes out of the proper repository, where it is kept as a public record, to shew what the Crown granted to the Duke of Cornwall, and what, upon the cesser of that estate, would revert to the Crown.

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*Tindal*, S. G. The very grant of *Ed. 3* directs the seisin to be given (a).

*Brougham*. We deny that it is one of the resolutions in the Prince's case, that the fee-simple of the duchy of Cornwall is in the Duke.

BAYLEY, J.—The Crown had the fee before the grant. In the Court of Exchequer you have an account of the revenues of the Crown; and if the Crown alienates any part of those revenues, there is an account kept in the Exchequer of what it was that the Crown alienated. This document gives an account of what the Crown alienated to the Duke of Cornwall.

*Brougham*. The country is bound by what is done by the Crown acting for the country; but this is a private account of the Duke's.

LORD TENTERDEN, C. J.—I think the foundation of the objection entirely fails. The objection is put upon the ground that this is a private document, and that the Duke of Cornwall is to be considered merely as any other of his Majesty's subjects, excepting only his very high rank. But I am clearly of opinion that the Duke of Cornwall is not to be considered as a private subject; when there is no Duke of Cornwall, the duchy belongs to the Crown; it is sometimes in the hands of the Duke, sometimes in the hands of the Crown. The Crown, therefore, or, in other words, the public, has an interest in every thing which is done in the duchy; and it appears to me perfectly immaterial whether the act done is done under the authority of the King or under the authority of the Duke, when there is

(a) So Selden, in his *Titles of Honour*, 2d part, c. 5, § 1, mentions that writs went to the Lords Justices of Wales, the Earl of Arundel, and Lord Talbot, to give seisin of the Principality of Wales to Edward the Black Prince. *Vide ante*, 152, (a).

a Duke; for in all these matters the interest of the Crown is equally concerned. I do not at all rely on the circumstance of its being mentioned in the minister's account.

Extracts from the document(a), which was in Latin, were then read; it was entitled, "The caption of seisin of the manor of Tewynton, to the use of the Lord Edward, Duke of Cornwall, first-born son of the Lord the illustrious King of England, by James de Wodestoke and William de Monden, assigned by the letters-patent of the Duke to do the same, on Monday the 12th day of the month of May, in the 11th year of the reign of King *Edward*, the 3d after the Conquest." The several species of tenants are then enumerated. 1st. The free tenants, of whom there were 34, whose holdings are thus entered:—

"*Free Tenants*.—William de Bodrygan holds of the Lord the Duke of Cornwall, in socage, seven Cornish acres of land in Tregrian, rendering therefore by the year, at the four usual terms of the year, in equal portions, 18s. 6½d.; and for fine of tin, at the Feast of St. Michael, 14d.; and doing suit at the Court of the Lord Duke from three weeks to three weeks.

"William de Denyck holds of the Lord Duke 12 Cornish acres of land, rendering therefore, by the year, at the four usual terms, 37s. 7d.; and for fine of tin, at the Feast of St. Michael, 18d.; and doing suit as above."

At the end of the free tenants, their rents, &c. are thus summed up:—

"Sum of these rents (b), beyond the fines of tin, 7l. 18s. 2½d. Sum, if rendered, of fines of tin, 14s. 2½d. Recognizance, 40d. All the aforesaid free tenants give to the Lord Duke 43d. for their recognizance, &c."

The next class are the free conventionaries, of whom there are 50 in number, and who are thus described:—

"Nicholas Wysa holds of the Lord Duke, *in conven-*

(a) This document is fuller than the *inquisitio post mortem Edmundi*, (*ante*, 151, (c)) as it enumerates the "lands" held by the freehold-

ers, and the "takings" by the conventionaries.

(b) The sum of the quit rents and fines of tin is 8l. 12s. 4½d.

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*tion*, 1 messuage, 7 acres of land, in 1 ferling of land in Merthyn, which he took of the Lord John, late Earl of Cornwall; to hold *in convention*, from the Feast of St. Michael, in the 7th year of the reign of the now King, to the end of seven years then next following and to be completed, rendering, therefore, by the year, at the four usual terms, 7s. 9d., and at the Feast of St. Michael a certain rent, called a fine of tin, and doing suit at the Lord's Court from three weeks to three weeks; and he shall be reeve, decennier, and beadle when he shall be elected; and shall properly sustain the messuage aforesaid; he shall manure the land with the whole stock, not making waste or destruction; and when he shall die, the lord shall have, in the name of a heriot, one beast, which shall be of the greatest price; and he shall have nothing of his other chattels. And he hath done fealty, and claims to hold the tenement aforesaid *in liberâ convention* by the aforesaid services, during the term aforesaid." The other entries respecting the free conventionaries refer to the first as follows:—"John Jacony holds of the Lord Duke 1 messuage, &c., which he took of the aforesaid Earl; to hold *in convention* for the term aforesaid, rendering therefore, &c., and doing suit and all other services *as the aforesaid Nicholas Wysa*."

The entries respecting Nansmelyn in this document are as follow:—

"Philip Nansmelyn holds of the Lord Duke 1 messuage, 11 acres of land English, in half an acre of land Cornish, in Nansmelyn, which he took of the aforesaid Earl; to hold *in convention*, for the time aforesaid, rendering therefore, by the year, at the four usual terms, 11s. and a fine of tin, and doing suit and all other services *as the aforesaid Nicholas Wysa*; and hath done fealty, and claims to hold these tenements *in liberâ convention* by the aforesaid services, during the term aforesaid."

"John de Nansmelyn holds of the Lord Duke 1 messuage and 11 acres of land English, in half an acre of land Cornish, in Nansmelyn, which he took of the aforesaid Earl; to hold *in convention* for the time aforesaid, ren-


dering therefore, by the year, at the four usual terms, 11s. and a fine, and doing suit and all other services as the aforesaid Nicholas Wysa; and hath done fealty, and claims to hold these tenements *in liberá conventione* by the aforesaid services, during the term aforesaid."

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"Jordan de Nansmelyn holds of the Lord Duke 1 messuage and 11 acres of land English, in half an acre of land Cornish, in Nansmelyn, which he took of the aforesaid Earl; to hold *in conventione* for the time aforesaid, rendering therefore, by the year, at the four usual terms, 11s. and a fine of tin, and doing suit and all other services *as the aforesaid Nicholas Wysa*; and he hath done fealty, and claims to hold these tenements *in liberá conventione* by the aforesaid services, during the term aforesaid."

"Gregory de Nansmelyn holds of the Lord Duke 1 messuage and 11 acres of land English, in half an acre of land Cornish, in Nansmelyn, which he took of the said Earl; to hold *in conventione* for the time aforesaid, rendering therefore, by the year, at the four usual terms, 11s. and a fine of tin, and doing suit and all other services *as the aforesaid Nicholas Wysa*; and hath done fealty, and claimeth to hold the tenements *in liberá conventione* by the aforesaid services, during the term aforesaid."

After the list of tenants *in liberá conventione*, it is written,—"All the free conventionaries aforesaid give to the Lord Duke 10s. for their recognizance. The sum of their rents is 18*l.* 17*s.* 2*d.*" Then follow the native (i.e. villein) conventionaries, who are 6 in number. "Nicholas Pantener, villein, holds of the Lord Duke 1 messuage, 7 acres and a half of land, in one ferling and a half of land Cornish, in Tyngaran, which he before took of the Lord John, late Earl of Cornwall; to hold *in nativá conventione*, from the Feast of St. Michael, in the 7th year of the reign of the now King, to the end of seven years then next following, rendering therefore, by the year, at the four usual terms, 8s. and doing suit at the Lord's Court from three weeks to three weeks; and he shall be reeve, decennier and beadle when he shall be elected, and shall be taxed at the

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will of the lord(a); and when he shall die, the lord shall have all his chattels; and the latest born son whom he shall leave alive shall have his land by a fine to be made with the lord at the same lord's will; and he hath done fealty, and claimeth to hold the tenements by the aforesaid servile services *in nativâ conventionione*, at the will of the lord, during the term aforesaid." The others are then enumerated, referring for the description of their tenure to the name at the head of the list. The sum of the native (i.e. villein) conventional rents is 1*l.* 14*s.* 5½*d.* After the native conventionaries come 5 natives of stock, who are thus described:—"Robert Ceron, a villein of stock, holds of the Lord Duke, in villenage, in Tyngaran, 1 messuage, 5 acres of land English, in 1 ferling of land Cornish, rendering therefore, by the year, at the four usual terms, 5*s.* 3*d.*, and doing suit at the Lord's Court from three weeks to three weeks; and he shall be reeve, decennier and beadle, when he shall be elected, and shall be taxed at the will of the lord; and when he shall die, the lord shall have all his chattels; and his last-born son whom he shall leave surviving shall have his land, by fine, which he shall make with the lord, at the will of the same lord. And he shall not be removed from the land for his whole life; and he hath done fealty." The others follow referring to the first; the amount of the rent of the villeins of stock, 33*s.* 5*d.* All the villeins, as well conventional as by blood, give to the Lord Duke, for their recognizance, half a mark.

Then follow entries of the letting and rental of 2 mills, the land of Wallan, containing 160 acres of waste, the pasture of the woods, and a fishery: after these come the

"Fines of Tin.—The land of Nicholas de Muleber, in the town of St. Austel, renders by the year, for a fine of tin, 3½*d.*; of the land of Robert le Toker, of the same, for the same, 2*d.*; of the land of John de Treyenock, for the same, 1*d.*; of the land of Philip Perys, of the same place, for the same, 2*d.*; of the land of the Pryer of Tywardreath

(a) As to the liability of the villein to be taxed *de alto et basso*, see Mann. Exch. Pract. 2d edit. 374, (i).

there, for the same,  $1\frac{1}{2}d.$ ; of the land of William Waker there, for the same,  $1\frac{1}{2}d.$  Fines of tin, of free conventionaries and villeins, at the Feast of St. Michael, worth, by the year, 20s. Also the toll of tin of Tewynton is worth, by the year, 6s. Then are entered "Pleas and perquisites of Courts, worth, by the year, in common years, 40s."

The next document produced was a minister's account of the 25 Ed. 1. It purports to be the account of Thomas de Okham(a), receiver in the time of Thomas de la Hide, steward and sheriff of Cornwall (b).

"Tewington Rents.—The same renders account for 25*l.* 3*s.*  $2\frac{1}{2}d.$  for rent of assize, by the year. Sum, 25*l.* 3*s.*  $2\frac{1}{2}d.$

"Issues of the Manor.—The same renders an account of 14*s.* 7*d.* for berbiage by the year; and for 23*s.*  $11\frac{1}{2}d.$  for works and customs remitted; and for 20*s.* for fine of tin by the year; and for 46*s.* 8*d.* for the farm of the mill this year; and for 22*s.* 11*d.* for the pasture of Wallan this year; and for 3*s.* for pasture in the wood this year; and for 6*s.* 8*d.* for pannage this year; and for 4*d.* for chevage this year; and for 6*d.* for the milldam of Pentewyn; and for  $3\frac{1}{2}d.$  for toll of tin this year; and for 4*s.* for the fishery by the year; and for 6*d.* for honey this year; for brushwood nothing this year; and for 31*s.* for 46 acres of waste at Wallan, let to farm for a term of six years (this being the fourth); and for 6*s.* for nine acres of the same land, let to farm as long as they will bear corn; and for 15*s.* for 15 acres assessed to ——— in the wood this year only; and for 24*s.* 4*d.* for 36 acres and an half, assessed to ———, as long as they will bear corn; and for 2*s.* for turbary this year. Sum, 11*l.*  $21\frac{1}{2}d.$

"Fines, Perquisites, and Reliefs.—The same renders an account for 18*d.* of John de Pabenden, and his two fellows, for default; and for 3*s.* of Roger de Carmerion, and his two fellows, for the same; and for 6*s.* 8*d.* of Humphrey de Beauchamp for the same; and for 2*s.* of Richard Lawrence, and

(a) *Vide* 2 Inst. 19; Mann. Exch. Pract. 2d edit. 74, (u).

(b) From the King's Remembrancer's Office.

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his three fellows, for non-appearance and default; and for 2s. of Alan de Hay for trespass; and for 18*d.* of William de Trenewith, and his fellow, for entry of land; and for 3s. for Walter Devyok, and his two fellows, for suit of Court and being released from the office of reeve; and for 2s. 6*d.* of Reginald Ceron and John de Tewyn for the same; and for 2*d.* of Simon Baby for unjust detention; and for 12s. 6*d.* of Hugh Fitz Walter, of Treverbyn, for relief of land which was of his father; and for 3s. of Paschas of Nansmelyn, a conventional, for this, that he might hold his land for the term of 10 years as he before held, this being the first year (*a*); and for 3s. of Edward de Trenewith and Matthew de Castle Gothon for the same."

After this there are several other similar entries, and a charge of 6s. 8*d.* of Henry of Nansmelyn, for having his land again which he before surrendered; and for 3s. 4*d.* for the chattels of John Porteyn, a conventional, deceased. Sum, 106s. 1*d.* Then follow allowances.—"Allowance in tithe of berbiage, 17½*d.*—in allowance of rent of the reeve and beadle, by the year, 5s.—in allowance for the pasture of Wallan, which is above assessed to farm, of 22s. 11*d.* for three years. Amount of the allowance, 29s. 4½*d.* And he owes 40*l.* 0s. 20½*d.*"

A document from the Exchequer, purporting to be an extent of Crown lands, and pursuing the directions of 4 *Edw.* 1, stat. 1, may be given in evidence without producing the commission.

After this was produced (*b*) an extent of the 1 *Ed.* 3; it consisted of several skins of parchment (*c*), fastened together at the top; on one of these was written, in the writing of the time, that it was an extent of the lands of Isabel Queen of England (*d*), then, 1st *Edw.* 3, in the king's hands; then came the extents of the several manors above mentioned, amongst which was the extent of the manor of

(*a*) Quod posset tenere terram ad terminum decem annorum quam prius tenuit, hoc anno primo.

(*b*) From the Lord Treasurer's Remembrancer's Office.

(*c*) On the back of one of the skins was indorsed in writing of the time—"Hos rotulos liberavit hic Rogerus de Gildesburg, senes-

callus Dni Regis de terris et tenementis quæ fuerunt Isabellæ, Reginæ Angliæ, citra Trentam, per præceptum Gulielmi, Norvicensis Episcopi, Thesaurarii, vicesimo secundo die Octobris anno regni Regis Edwardi, tertii a conquestu, quinto."

(*d*) *Antc.* 155.

Tewynton, enumerating free tenants, whose rents amount to 7*l.* 16*s.* 1½*d.* besides fines of tin, which are in sums certain, and the same, respectively, as mentioned in the caption of seisin. It then states the free conventionaries, and amongst them, John de Nansmelyn holds half an acre of land, and renders annually 8*s.* 6*d.* Philip, of the same, holds half an acre of land, and renders annually 8*s.* 6*d.* Jordan, of the same, holds half an acre of land, and renders annually 8*s.* 6*d.* Gregory, of the same, holds half an acre of land, and renders annually 8*s.* 6*d.* (a).

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*Brougham.* We object to this document. It does not appear upon the instrument itself under what authority it was taken. The commission is not here. There is no description of the instrument as belonging to a particular class; no reference to the persons taking it, nor any description of their office; and though opened by the Attorney-General as an exteut of the manors in the holding of Queen Isabel, there is nothing to shew that it was an exteut of her manors; it appears to be merely an old parchment, tied up with a great number of separate parchments called extents, each being entitled exteut of *A.* or *B.* It is not signed, nor does it appear whether it was taken by a jury or by persons appointed for the purpose. One purports to be taken "upon oath," but it does not say upon the oath of whom; nor does it appear under whom the oath was taken. This is not receivable in evidence, unless it be meant to be said, that whatever is to be found in the Remembrancer's Office may be given in evidence. The custody of documents that would of themselves be evidence is material, as giving security that a supposititious instrument has not been introduced. But the mere custody out of which an instrument comes cannot make it evidence.

(c) This appears to have been read for the purpose of shewing that Nansmelyn was held in four portions, each at 8*s.* 6*d.*; corresponding with the assession-roll, *post*, 185, and at a varying rent.

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*Wetherell, A. G.* The memorandum professes that the roll of documents is a collection of rolls delivered in by the King's steward; and this extent is one to which the memorandum applies. The Crown was in the habit from time to time of taking extents of manors which returned to the Crown. This is required by statute 4 *Edw. 1, Extenta Manerii*. This statute does not point out the precise mode in which the extent is to be taken. It does not say that it shall be an extent under the Exchequer Seal or the Great Seal. The extent of a Crown manor coming out of the Lord Treasurer's Remembrancer's Office is of itself evidence. The reason appears to be, that this statute required that extents should be made from time to time, for which practice the interest of the Crown would be a sufficient reason, the Crown always having an interest in its grants. But looking at the document, accompanied by that memorandum, coming from the proper depository, the steward of the King, in his manors south of Trent, was the proper hand to deliver it.

*Tindal, S. G. ad idem* The charter of 11 *Edw. 3* shews the land granted to Queen Isabel, which proves that the subject-matter of this extent is the property of the Crown. On the death of *Edw. 2*, it became important that *Edw. 3* should see by some survey what was reverting to the Crown. The rolls purport to have been taken by the free tenants of the manor, before the steward of the manors south of Trent. The inquiry is made, the records find their way into the Exchequer, and are there deposited by order of the treasurer in the proper depository. There is not the least reason to impute any fraud or wish to increase what was found in manors of the Crown. This being an inquiry between the last grantee and the tenant in reversion, what is there to impeach it from those who stood in the neutral situation of mere tenants? It is therefore clothed with all those characters which belong to the public official documents of the country (*a*).

(*a*) *Mr. Illingworth* here stated      proper skin; that in almost all cases  
 that the indorsement is upon the      of men of great property the ad-

Sir *J. Scarlett, ad idem.* The public has an interest in the property of the Crown, which represents the public. The property in which the public has an interest is conducted by certain rules; some derived from ancient practice, and some from acts of parliament, which put it upon a footing different from the property of private individuals. Whenever a public officer is charged with a duty, whatever he has done in that capacity is admitted in evidence. The records of the Custom House are daily admitted in evidence. The statute of 4 *Edw.* 1 required extents to be taken. Extents were taken of property in which the Crown was interested, forming part of the public revenue by which the interests of the public were maintained. The revenue of the Crown was administered by the Exchequer, which is therefore the proper Court to have the documents and muniments of property. The documents which ought to have been made under the statute being found in the proper custody at a period of antiquity, it would be inferred that every thing was rightly done. These documents are in the nature of records, being filed in that Court which has the administration of the King's revenue, with a duty cast upon it, to receive no documents which are not in their nature public, and kept for public purposes.

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*Brougham*, in reply. The argument would let in every paper found in any custody purporting to relate to Crown property. It is assumed that the custody in which this document was found is confined to extents, but a vast number of other documents of the same sort are to be found in the same place. The steward of the lands on this side Trent is not a person to have ascribed to him any authority to take these extents. Nor does it appear that he took them. He says that they were delivered in by him; *non constat* by whom they were taken.

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LITTLELALE, J.—It was the duty of the steward to hand them into the Exchequer.

*Brougham.* It does not appear that the steward gave directions for the extent to be taken.

Lord TENTERDEN, C. J.—It appears that Gildesburg was one of the auditors, and that the parties came before him. That shews that Gildesburg, who delivered in the roll, had himself taken the account. He is in Cornwall, and the parties come before him.

*Brougham.* That does not carry the evidence further as to his being the person who made the general return. No extent or inquisition has ever been given in evidence, where it has not appeared, at least by the instrument itself, under what authority and by whom it was taken.

Lord TENTERDEN, C. J.—I am of opinion that this document must be received in evidence. An act of parliament, made in the fourth year of King Edward I. directs extents, containing an account of manors similar to that in the document in question, shall be made. It appears by another document, which has been already put in (*a*), that King Edward II. granted to his Queen Isabel certain possessions and manors, according to the extent thereof made or to be made, to be held by her during the King's pleasure. That grant would expire upon the death of the King who made it, if not before revoked, it being for his pleasure only, and the King, his successor, might renew it, if he thought proper. In the first year of the reign of his successor, Edward III., Roger de Gildesburg, who is said to be steward of the lord the King of the lands of the King, which were of Isabel Queen of England, on this side Trent, delivers these rolls by command of the King's treasurer; and upon looking at the document itself, it appears to be

(*a*) *Ante*, 155.

taken before him, the parties come before him, and at the close of it, it is stated that those are committed to prison who are in arrear. The document is found in that office in which documents relating to the lands and revenues of the Crown were usually deposited; and the only ground of argument against its reception is, that it does not appear to be taken under any warrant from the King or any competent authority; but considering the nature of the instrument itself, and the statute that requires such things to be done, and the place in which it is found, we must presume that it was not taken without proper authority. I do not know that that authority need be given by any letters-patent or any instrument; I do not know that the King might not, verbally, or by one of the superior officers, have directed it to be taken: we must presume that it was taken by a competent authority.

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BAYLEY, J.—Considering that the instrument is found in the place where it ought to be found, and that it would be a serious breach of duty in the person who kept that office to suffer a thing to be received there that had not been duly taken, it appears to me that we are at liberty to presume, and bound to presume, that it was duly taken under the statute. There are many different inquisitions taken, some by virtue of commissions only, and others which particular officers are entitled to take *virtute officii*. The statute directs that inquiry is from time to time to be made, without saying by whom it is to be made; each officer, therefore, would be bound to take upon himself, without any express direction, the duty of making that inquiry; and I collect from what is stated here, that another branch of inquiry required by the statute has been executed by this document, namely, what advowsons there are in the limits that belong to the presentation of the King. Now, amongst other things, this document does contain that inquiry. For this reason I am of opinion, that though the instrument does not purport upon the face of it to shew that it was

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taken under any specific commission, as there are officers whose duty it is to take it, and as it is found in the proper depository, it is to be received in evidence.

LITLEDAL, J.—I am of the same opinion. If this document was to be considered as a survey of private manors, it certainly could not be received; but here there is a statute that directs extents and inquiries to be made as to certain possessions of the Crown, and this document we find in the proper place, in the Court of Exchequer, where extents taken under that statute are usually kept. The next thing is, is there anything to show that it has not been properly made? We find that, according to the usual practice in extents of this kind, there is an account given of the advowsons and churches; that there is an indorsement on the last skin of this instrument, stating by whom it was delivered into the Court of Exchequer; that the person thus delivering it into the Court of Exchequer was one of the auditors before whom the extent was made and the accounts passed; he is the officer who might be considered as having to make the extent, and he says he delivers it by the direction of the Lord Treasurer of England, who is the proper officer on the part of the King to give directions for the execution of the extent. It is said there ought to have been a regular commission. Whether an actual commission was requisite it is not perhaps necessary to inquire, as the statute does not prescribe any particular form. But the mere want of a commission is not sufficient to render the document inadmissible, if there be sufficient to raise a presumption that it was regularly made up.

PARKE, J.—I am entirely of the same opinion, for the reasons stated; and I will only add, that it appears to me this case falls within the provisions of the statute. There is a direction in the ninth section, that there should be an inquiry not only concerning the freeholders, but also of the customary tenants, “that is, to wit, how many there be, and

how much land every of them holdeth, what works and customs he doth," and other particulars, all of which, or most of them, are to be found in this document. It seems to me that this must be taken to be made by competent authority, whether by commission or by the steward. It is a duty belonging to the office of steward, and if a commission was necessary, there are many cases (a) to show that the loss of such commission would be presumed. It seems to me quite clear that it ought to be received in evidence.

*George Harrison, Esq.* being examined, stated that he was Auditor and Keeper of the Records of the duchy of Cornwall, by letters-patent, 17th May, 1823; that this office existed previously to 7th Edw. III.; that his duty was to examine and audit accounts of ministers and accountants of the Duke of Cornwall, and preserve and keep records of the office accounts, which are declared in the Exchequer when the duchy is in the Crown.

The statute 3 Geo. 4, c. 78, was read, directing that commissions for holding courts of assession in the duchy manors should be issued by three principal officers of the duchy.

*Mr. G. Harrison* then produced the first assession roll. Before it was read, he stated on cross-examination, that the assession books were sent up from Cornwall to the office and kept there; that extracts of the court rolls were sent up, but not the court rolls themselves; that such extracts were kept in the office, and were returned by the stewards every year; that the tenants had access to the assession roll upon assigning a reason for asking to see it. On re-examination, he stated that the assession rolls were regularly returned under the commission every seven years; that they were not all in the office, but that there were intervals and gaps; and that the course appeared to have been the same from the earliest antiquity.

(a) *Anderton v. Magawley*, 3 Bro. *Bishop of Bangor*, cited 2 Gwill. Parl. Cas. 208; *Killington v. Master and Fellows of Trinity College*, 542; *Gilbert, Ev.* 55, 64; *Buller*, N.P. 228; *Cope v. Bedford*, Palm. 426; *Green v. Proude*, 1 Mod. 117, 1 Wils. 170; *Baylie v. Wylie*, 6 Esp. N. P. C. 85; *Bagshaw v.* per Hale, C. J.



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*Brougham.* This assession roll is not receivable in evidence, upon the principle on which this trial is now had. This is a new trial after great argument upon the very point. [*Bayley, J.* Not as applicable to these ancient documents, but as applicable to some modern documents that appear to have been taken in a peculiar way.] The whole of the assession rolls were objected to, and a new trial was granted, upon the ground of their being admitted in evidence without the court rolls. The Lord Chief Justice's judgment is, "We are all of opinion that the books or rolls, as they were called, which were offered and received in evidence, sent down from the duchy office here in London, were not admissible in evidence, unaccompanied by the manor rolls that were kept in the country. Whether the manor rolls kept in the country might afterwards be offered and received in evidence in explanation of them, it is not necessary to decide; on that point we are not altogether agreed." [*Bayley, J.* At the time that was presented to our consideration we were aware of the modern practice, which was, to send up from the country certain rolls, from which rolls the assession rolls were made in London, and those assession rolls had been received in evidence; we thought, therefore, there was an irregularity with reference to the mode in which these rolls were made up.] That is not the ground upon which the judgment of Lord *Tenterden* puts it, but surely there is now less foundation than before laid for producing them. Before, the Court saw the accounts, and the way in which they were made up. The defendants are here desiring to put in an assession roll, and make evidence of it, merely upon the ground of its coming out of the duchy office. It came out of the same custody before, and therefore in whatever way it was made up, if it came out of that custody, it ought to have been admitted in evidence here without any proof of the manner in which it was made. They bring it up from the duchy and tender it to your Lordships upon the ground of its coming from the duchy, which they did before, and

there was exactly the same argument urged upon the former occasion; it was then very fully argued. The present Lord Chancellor, on behalf of the defendant, put the case in all those different lights in which it has been placed by Sir *J. Scarlett* and one of your Lordships, but the Court held that those assession rolls were not evidence; undoubtedly, by calling Mr. *G. Harrison* instead of Mr. *Abbott*, they have prevented the Court from knowing the mode in which the roll is kept, and that the tenants of the manor have not access to it. Mr. *G. Harrison* will not say that he remembers that any order was given to inspect. Since the trial at bar was ordered there has been full leave to inspect; that was one of the terms, and this shews, that before that time, inspection was not a matter of course, very far from it, it was a matter of reference to the witness, and of very great deliberation; and it may be taken to be the fact, that the tenants have not hitherto been admitted to inspect, as they would have been in any manor court.

After hearing *Erskine*, the Court suggested to the counsel for the defendants, that, to save time, other evidence should be given, shewing that the tenants were aware of and bound to attend the Courts of Assession.


The parliamentary survey was accordingly put in, and extracts were read as follow:—

“ A Survey of the Manor of Tewington, with the rights, members and appurtenances thereof, situate, lying and being in the county of Cornwall, part of the ancient duchy, and parcel of the possessions of Charles Stuart (*a*), late Duke of Cornwall, but now settled on trustees for the use of the Commonwealth, held as of the manor of East Greenwich, in free and common socage by fealty only, taken by Edward Hore, George Crompton George, gentleman, Gabriel Taylor and George Goodman, and by them returned the 10th day of May, Anno Domini 1650.”

“ Manor of Tewington.—The tenants of the said manor, Pierce Edgcombe, Esq. son and heir of Richard Edgcombe,

(*a*) *Charles 2.*

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holdeth freely to him and his heirs for ever in socage seven acres of land Cornish, for which he payeth, at the feast of Michael-tide only, per annum 18s. 6½d., for tin fine 1s. 2d." There is a column for the rent for the fine of tin all the way through.

"Conventional tenants of inheritance within the said manor.—Oliver Saule, Esq. by the death of Mary Saule, widow, holdeth in free conventional to him and his heirs for ever, from seven years to seven years, according to the custom of the manor, one messuage, with the appurtenances, in Towyn, for which he payeth per annum 8s." No column for tin fine, and no fine of tin specified all the way through.

"Nansmelyn.—John Rowse, by the surrender of Peter Rowse, holdeth to him and his heirs (as aforesaid) in free conventional, from seven years to seven years, according to the custom of the manor, two-and-twenty parts of one messuage, and twelve acres of land English, in half an acre of land Cornish, divided into forty-two parts, in Nansmelyn; and John Bennett by the death of Philip Bennett, and Simon Bonning by the surrender of John Killiowe, hold (as aforesaid) the residue, videlicet, twenty parts, for which they pay per annum 11s., fine 3s. 4d. The said John Rowse, by the surrender aforesaid, holdeth (as aforesaid) in free conventional, one messuage and eleven acres of land English, in half an acre of land Cornish, in Nansmelyn aforesaid, for which he payeth per annum 11s., [in the margin 5s.] The said John Rowse also holdeth (as aforesaid) in free conventional, by the surrender aforesaid, one other messuage, and eleven acres of land English, in half an acre of land Cornish there, for which he payeth per annum 11d. The said John Rowse likewise holdeth (as aforesaid) by the surrender aforesaid, in free conventional, one other messuage, with eleven acres of land English, in half an acre of land Cornish there, for which he payeth per annum 9s., fine 5s."

"The tenants of the said manor do give, in way of acknow-

ledgment to the lord of the said manor, for the lands and tenements aforesaid to be taken, the sum of 40s. to be paid within six years after every assession, videlicet, per annum, 6s. 8d. total 40s."

The document then contains an account of the customs in the duchy manors, as follows:—"First, there ought to be kept every seventh year an Assession Court for the said manors, unto which all the customary tenants are by their customs bound to repair, there to enter their claim and new take the several tenements that they hold. Not that their former titles to the same do then determine, (it being by them held to them, their heirs and assigns for ever, according to the custom of the manor,) but for that thereby divers advantages do or may accrue unto the lord, 1st, thereby the way of paying the lord's rents and fines is duly kept and observed, which are paid as followeth, (videlicet) the whole rent and a sixth part of the fine and old knowledge money is paid every year for the first six years after every assession year, and on the seventh year, or assession year, the rent only; 2dly, thereby the lord shall also come to the knowledge of his present tenants, there being divers surrenders made within the space of seven years, the customary tenants having power in themselves to divide and surrender away the whole or any part of the tenement that he enjoys to whom he pleases; 3dly, for that by such surrenders there accrueth unto the lord a new rent, which is called new knowledge money, which said rent is double the rent and fine of such tenement or part of tenement so surrendered, and is to be paid by the party to whom such surrender was made, with the rent and fine of such tenement or part of tenement, within three years next after every such assession year, which new rent or new knowledge money will amount unto, one year with another, 30s.; and, lastly, for that at every such assession, if there be any encroachments made upon the lord's wastes, or new houses built, the same being then presented, the party by whom such encroachment hath

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been made is to come to the said assession and take the same at the lord's hand, under such rent and for such time as shall please the lord of the said manor, or otherwise the said lord may enter upon the same for his own use. As there ought to be kept every seventh year an Assession Court, so there ought to be kept twice every year a Court-leet, and every three weeks in the year a Court-baron, to which both free and customary tenants are bound to do their suit, and at which Courts any action arising amongst the tenants, either for debt or trespass, is by the steward and a sufficient jury of the homage there determinable. There is presented at one of the law Courts yearly by the homage, a fit person of one of the customary tenants to be Reeve, who is to execute that office upon oath, and for the time he continues Reeve is to summon and call the Courts of the manor, and to collect the lord's rents and fines, and to make distresses for the same if any shall be unpaid, and to be accountable for the whole rent unto the lord. Also the said Reeve is to seize all such heriots, waifs, estrays, felons' goods, wrecks of the sea, and such other casualties as shall happen during his year. Likewise he is to gather all such reliefs, fines, issues, amerciaments and other casualties and perquisites of Court that shall happen as aforesaid, and to be accountable for the same; which said casualties and perquisites will amount unto, one year with another, 6*l.* 10*s.* Likewise there are presented other sufficient men of the customary tenants to be Viewers of Reparations, Tithingman and Beadle within the said manor, who also are to execute the same upon oath. The free tenants of this manor pay, on every death or alienation, a relief, according to the custom of the country, (*viz.*) for every acre of land Cornish 12*s.* 6*d.* and so apportionably for such quantity as they hold. The customary tenants pay on every death a best beast for a heriot, for every tenement that they die possessed of, which said tenement or tenements do immediately (from and after the decease of every such tenant) descend unto his wife, if he have any, for term of her life, and from after her decease to the right heir of her

husband, according to the custom of the manor. This is an exact survey of the said manor, taken and returned by us, Edward Hore, G. Crompton and others" (a).

Then were produced (b) files of warrants and certificates and other business, the 11th October, 9 *Charles* 1.

"Manor of Tewington.—Forasmuch as by the course of time the year falleth out to be the assessionable year of the manor aforesaid, parcel of the ancient inheritance of the duchy of Cornwall, at which assessionable year the tenants of the said manor have anciently used to take the customary tenures to them and their heirs from seven years to seven years, according to their custom, by a commission for that service to certain commissioners specially directed, therefore the customary tenants of the said manor, whose names are subscribed, as well for themselves as the residue of the homage absent, made their repair at his Majesty's audit, held at Liskeard for the said duchy, the day and year above said, and presented themselves ready to renew their takings, according to their said ancient customs, and prayed their admission accordingly, and for that there was at this audit no commission directed for performance of this service, therefore they humbly pray that their tender may be accorded by his Majesty's auditor of the said duchy for the time being, or his deputy." Similar memorials for other assessionable manors being offered,

*Brougham* objected to their reception. The defendant is now attempting to put in the acts done and memorials presented by the tenants of other manors. These are applications from other manors. This raises the objection against going into other manors, perhaps in a stronger form than any other that might be put; it is introducing a memorial presented by the tenants of one manor respecting a Court, which, if it exist at all, of which no evidence is given, exists separately in each manor. There is mention of the Court

(a) See further extracts from the parliamentary survey, *post*.

(b) From the office of the Duchy of Cornwall.

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and practice in Tewington; they have given no evidence of any other manor, and according to the rule of not going into other manors, they could not have read the parliamentary survey for that purpose. What the tenants of one manor do in respect of a Court there holden cannot bind the tenants of the other manor in question; its being an act done, does not make it different at all. Suppose evidence was attempted to be given that the tenants of one manor could not cut down timber, and then that one tenant in the manor, or a number of tenants, had been fined for cutting down timber, or, as it might be in some cases, as it would in some copyholds, had forfeited for waste, it would be an act done. The cutting the timber and forfeiture would be things done; but they could not be given in evidence to prove that in a certain manor, the custom and tenure of which were in dispute, that such was a custom to bind the tenants of those manors.

*Erskine, ad idem.* In the document they have just read, it is stated there ought to be kept every seventh year an Assessment Court for the said manor. The Courts are separate, and the memorials are separate, it being an application that their individual appearance may be recorded, and not for any joint acts of the tenants of Tewington and other manors, but each separately making the application. The memorial was from each set of tenants separately, and the parliamentary survey has shewn that this Court was holden for that manor; and though the other manors may have Courts, that would not let in evidence of the other manors, or you might let in evidence of any manor court in the kingdom. You might say here is a manor court for A., here is another for B., and what is done at one I shall shew to be inconsistent with the right you set up.

Lord TENTERDEN, C. J.—When they offer the commission for all the manors then you object, and when they offer evidence for a separate manor then you object to that.

*Erskine.* We are not aware that they have offered the commission for all the manors.

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LORD TENTERDEN, C. J.—The assession roll contains a recital of the commission for all the manors.

*Brougham.* I think they have done enough to differ the present case of tendering the assession roll, from the circumstances in which it was tendered before. They have given some evidence of the custom as to the tenants, free as well as conventional, that they did attend that Court, and I do not mean to object to it.

Translated extracts from the assession roll, 7 *Ed. 3*, were then read.

“The assession of the lands of the Lord John, son of the illustrious King(a) of England, Earl of Cornwall, in the 7th year of the reign of King *Edward*, the 3d after the Conquest, by Sir Richard Chambernoun, knight, John Berlond, Richard de Backhampton, and Thomas de Hockell, for this purpose assigned by letters of the Lord the Earl in these words:—John, son of the noble King of England, Earl of Cornwall, To all sheriffs, constables, bailiffs, and other ministers, as well within franchises as without, and to our other friends and faithful persons who shall see or hear these our letters, greeting. Whereas many of our tenants of our seigniorie of Cornwall have long holden, and do yet hold, in divers manors, great part of our demesne lands of those parts in covenant (*in conventione*), rendering for the same lands certain rents by the year; and their terms wholly expire at the Feast of St. Michael next coming, as is and ought to be known in the country; and forasmuch as we have the power, without doing wrong to any one, to retake our said lands into our own hands, and make thereof our profit, which may, perhaps, turn to the injury and damage

(a) *i. e.* of the late King *Edw. 2.*



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of our said tenants; but nevertheless we will for their ease, that they may henceforth hold by new covenant the same lands in convention (*in conventione*), so that they always render to us the same value thereof in manner as between them and our ministers, whom we have sent thither for this purpose, may be agreed: Therefore we make known unto you all that we have appointed as attorneys, and put in our place, our very dear and beloved bachelor, Sir Richard Chambernoun, and our dear valets, John de Berlond, auditor of our accounts, Richard de Backhampton, our steward of Cornwall, and John de Hockell, giving full power to them four jointly, or to three of them, (of whom the said John shall always be one,) to assess our lands aforesaid, and to let them in convention (*in conventione*), by indentures or inolments, for term of life, lives, or for years, according as it shall seem to them for the good of our said tenants who now hold our same lands, or in their default to others who will give us more, as shall be most for our profit, ratifying and confirming what the said Sir Richard, John, Richard, and Thomas, or three of them, (of whom the said John shall always be one,) shall do as is above said in our name in the matter aforesaid; wherefore we pray that you will be to them attendant, aiding and advising as much as in your power, for love of us. In witness whereof to these our letters-patent we have put our seal. Given at Knaresborough the 20th day of November, in the 6th year of the reign of our dear Lord and brother the King. By force of which letters the said Sir Richard, John, Richard, and Thomas, have assessed all the lands within written for seven years next after the said Feast of St. Michael, except the lands which the villeins hold in villenage as of stock, and not beyond, because it seemed not to the said assessors to have been to the advantage of the lord to have let them longer at that time for many causes to them evidently appearing. And for some of those causes, and others, they have granted that every of them who have so taken any of the same

lands, shall pay of his fine (a) to be made on that account, a third part, at the Feast of Easter then next coming after the Feast of St. Michael abovesaid, and another third part thereof at the Feast of Easter then next following; and hereupon all the within written have taken the lands underwritten by the number of English acres by the same measured, that is to say, every of them at his peril, by the order and setting out of the said assessors, to hold as in quantity of the accustomed Cornish tenure (b) for the term aforesaid, according to the form and condition underwritten, except the villeins who hold the tenements within written as of stock; so that if more shall be found in the tenures which they shall so receive of the lands aforesaid beyond the mesuage and the said number of acres, that surplus shall be valued to the use of the lord by his steward there, (except the said tenements holden in villenage as of stock, as above,) although if less be found it is not to be allowed, as by express covenant hereupon made; and they have begun at Helleston, in Kerrier, in form underwritten. First were read extracts from the assession of the manor of "Tewington."

"Free Conventionaries."

"Nicholas Wysa hath taken one messuage seven acres of land in one ferling of land, which the same Nicholas before held and holds in Merthyn; To hold *in conventionie* from the Feast of St. Michael next following after the date of this roll, unto the end of seven years next following, rendering therefore by the year 7s. 9d. at the four terms, and a certain rent called a fine of tin, suit and all other services as before he was accustomed

(a) The fine would on this agreement be paid in two years. From the accounts of the reeves of the manor of Tewington, 23 Ed. 3, the fine then reserved was payable in three years. In 31 Ed. 3, it was made payable in six years.  
(b) i. e. admeasurement; vide *post*, 194.

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Fine, 13s. 4d. to do; and he gives to the lord for a fine, &c.;  
 Increase, 6d. and he hath done fealty, &c.”

“ John Jacony (a) and John Wynnnon have taken one messuage and eleven acres of land English in half an acre of land Cornish, which the same holds in Tyngaran; To hold *in conventionne* as above, rendering therefore by the year 11s. at the four terms, whereof of new increase 6d., suit and other services; and he gives to the lord for a fine, &c.; and he hath done fealty, &c.

“ Michael de Tyngaran hath taken one messuage, five acres and a half of land English in one ferling of land, which the same holds in Tyngaran; To hold *in conventionne* as above, rendering therefore by the year 5s. 6d., whereof of new increase 3d., suit and other, as above; and he gives to the lord for a fine, &c.; and he hath done fealty, &c.”

“ John Wysa hath taken one messuage, three acres of land English in half a ferling of land, which the same before held and holds in Penfenten; To hold *in conventionne* as above, rendering therefore by the year 3s. 3d. at the four terms, whereof of new increase 1½d. suit and other, as above; and he gives to the lord for a fine, &c.; and he hath done fealty, &c.”

In the next entry it originally was “ William Jacony,” which is struck through with a pen, and “ Richard Penfenten” written over it, “ hath taken one messuage, three acres of land English in half a ferling of land Cornish,

(a) The original roll appears to have been altered, in many instances, by the addition and substitution of names of the tenants. The alterations are in ink of a different colour, but in hand-writing

apparently of the same period as that of the entries in the roll as they originally stood. In the entry above, the name of John Wynnnon is inserted after that of John Jacony.

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which the same held in Penfenten; To hold  
*in conventione* as above, rendering therefore  
 by the year 3s. 3d. at the four terms, whereof  
 of new increase 1½d., suit and all other as  
 above; and he gives to the lord for a fine,  
 &c.; and he hath done fealty, &c.”

Fine, 10s.

Increase, 1½d.

“Walter Billoun hath taken one messuage,  
 seven acres and a half of land English in one  
 ferling of land Cornish, which the same holds  
 in Tyngaran; To hold *in conventione* as above,  
 rendering by the year 8s. at the four terms,  
 whereof of new increase 1½d., suit and other,  
 as above; and he gives to the lord for a fine,  
 &c.; and he hath done fealty, &c.”

Fine, 6s. 8d.

Increase, 3d.

“John Neva hath taken one messuage,  
 five acres of land English in one ferling of  
 land, which he holds in Tyngaran; To hold  
*in conventione* as above, by rendering there-  
 fore by the year 5s. 6d. at the four terms,  
 whereof of new increase 3d., suit and other  
 as above; and he gives to the lord for a fine,  
 &c.; and he hath done fealty, &c.”

Fine, 6s. 8d.

Increase, 2½d.

“Nicholas Megir hath taken one mes-  
 suage, five acres of land English in one  
 ferling of land, at Tyngaran, which the said  
 Nicholas holds there; To hold *in conventione*  
 as above, rendering therefore by the year  
 5s. 6d. at the four terms, whereof of new  
 increase 2s. 4d., suit and other as above;  
 and he gives to the lord for a fine, &c.; and  
 he hath done fealty, &c.”

Fine, 5s.

No increase.

“John Breton hath taken one messuage,  
 three acres and a half of land English in a  
 fourth part of half an acre Cornish, whic<sup>h</sup>  
 John Neva before held, and as yet hold<sup>s</sup>  
 in Castelgothon; To hold *in conventione*, as  
 above, rendering therefore by the year 3s. 6d.,  
 at the four terms, suit and other as above;

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and gives to the lord for a fine, &c.; and he hath done fealty, &c. Sureties, Robert Trevysek, Pasco Castelgothon."

The next is, "John Fox hath taken one messuage, five acres of land English, in one ferling of land Cornish, which the same holds in Tyngaran; To hold *in conventione*, as above, rendering therefore by the year 5s. 6d., at the four terms, whereof of new increase 3d., suit and other service, &c.; and he gives to the lord for a fine, &c.; and he hath done fealty, &c."

"Eustace Poundrey hath taken one messuage, six acres and a half in one ferling and a half of land Cornish, which the same holds at Castelgothon, and which Auncel Mathern before held; To hold *in conventione*, as above, rendering therefore, by the year, 7s. at the four terms, suit and other services; and he gives to the lord for a fine, &c.; and he hath done fealty, &c."

The next is "John Billoun;" he is stated to have taken one messuage, five acres of land English in one ferling of land, Richard Martyn before held, and as yet holds in Tyngaran; To hold *in conventione*, as above, rendering therefore, by the year, 5s. 6d. at the four terms, whereof of increase 3d., suit and other, &c.; and he gives to the lord for a fine, &c.; and he hath done fealty, &c."

"William Jacony," which is written over the name of Richard de Penfenten, "hath taken one messuage, five acres of land, in a moiety, which the same holds in Penfenten, as appears by the extent; To hold *in conventione*, as above, rendering therefore, by the year, 5s. 6d. at the four terms, whereof of

new increase 3*d.*, suit and other as above ;  
and he gives to the lord for a fine, &c. ; and he  
hath done fealty, &c. ; and be it remembered,  
that the other moiety, which is charged with  
5*s.* 3*d.* rent, remains to be let, because he  
holds no more *in conventione*, nor is it con-  
tained in the same, as it is said. *Ideo appruetur (a), si post mensurationem inveniatur.*"

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The entries respecting Nansmelyn are as follow :

" Philip de Nansmelyn hath taken one  
messuage, eleven acres English in half an  
Fine, 20*s.* acre Cornish, which the same holds in Nans-  
Increase 2*s.* 6*d.* melyn ; To hold *in conventione*, as above,  
rendering therefore by the year 11*s.*, at the  
four terms, whereof of new increase 2*s.* 6*d.*,  
suit and other, &c. ; and he gives to the lord  
for a fine, &c. ; and he hath done fealty, &c." (b)

" John de Nansmelyn hath taken one  
messuage, eleven acres of land English in half  
Fine, 20*s.* an acre Cornish, which the same holds in  
Increase 2*s.* 6*d.* Nansmelyn ; To hold *in conventione*, as above,  
rendering therefore, by the year, 11*s.* at the  
four terms, whereof of new increase 2*s.* 6*d.*,  
suit and other, &c. ; and he gives to the lord  
for a fine, &c. ; and he hath done fealty, &c."

" Jordan de Nansmelyn hath taken one  
messuage, eleven acres English in half an  
Fine, 20*s.* acre Cornish, which the same holds in Nans-  
Increase 2*s.* 6*d.* melyn ; To hold *in conventione*, as above, ren-  
dering therefore by the year 11*s.*, at the four  
terms, whereof of new increase 2*s.* 6*d.*, suit

(a) "*Appruere*" *Commodum Domini facere de prædiorum exitibus. Ducange.* So the words "*commodum suum facere*," in the statute of Merton, 20 *Hen.* 3, are translated "*approve*." And in the statute of *Extenta Maherii*, 4 *Ed.*

1, stat. 1, we find "*Item inquirendum est de boscis forinsecis, ubi alii communicant, quid de eisdem boscis dominus posset sibi approbare.*" *Post*, 187.

(b) It was 8*s.* 6*d.* in the extent of Isabel. *Ante*, 164, 5.

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Fine, 20s.

Increase 2s. 6d.

In the lord's  
hands. (a)  
Fine, 6s.

Native Con-  
ventionaries.  
Fine, 10s.  
Increase, 1½d.

and other, &c., and he gives to the lord for a fine, &c., and hath done fealty, &c.”

“Gregory de Nansmelyn hath taken one messuage, eleven acres English in half an acre Cornish, which the same holds in Nansmelyn; To hold *in conventione*, as above, rendering therefore by the year 11s., at the four terms, whereof of new increase 2s. 6d., suit and other, &c., and he gives to the lord for a fine, &c.; and he hath done fealty, &c.”

“Henry de Trenewith hath taken one messuage, ten acres English in half an acre Cornish, which the same holds at Trenewith; To hold *in conventione*, as above, rendering therefore by the year 10s. 6d., at the four terms, suit and other, &c.; and he gives to the lord for a fine, &c.; and he hath done fealty, &c. Sureties, Robert Trevysek, Roger de Peires.”

“Nicholas Pentener, a villein, hath taken one messuage, seven acres of land in one ferling and a half Cornish, which the same holds in Tyngaran; To hold for the time aforesaid, *at the will of the lord*, rendering therefore by the year 8s., at the four terms, whereof of new increase 1½d., suit and all other services which before he hath been accustomed to do, and when he shall die, &c.; and he gives to the lord for a fine, &c.; and he hath done villein's fealty, and other, &c.” (b)


Then follow other entries of native conventionaries; at the end is added, “Sum of rent of conventionaries, as well

(a) There are several instances of takings with similar entries in the margin. There are also several instances of freemen and villeins holding together, and of villeins taking land which had been

held by free conventionaries, and *vice versa*. And see *post*, 188, 9, 193; Mann. Exch. Pract. 2d edit. 368, 9, n.

(b) *Fidelitatem nativi*.

freemen as villeins, with the increase at the four terms, equally, 20*l.* 6*s.* 7½*d.* whereof of new increase 46*s.* 9½*d.*, to wit, at every of the first three terms 10*l.* 7½*d.*, and at the Feast of St. Michael 10*l.* 8½*d.*, besides the tenements not yet let, as below."

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" Robert Ceron, a viltein of stock, holds in Tyngaran one messuage, five acres of land English in one ferling of land Cornish, rendering therefore by the year 5*s.* 3*d.*, at the Tallage 3*s.* 4*d.* four terms, suit and other, &c., and when he shall die, &c.; and he gives to the lord for tallage on the occasion aforesaid, &c."

Then follow other similar entries, after which is added, " Sum of the rent of villeins of stock at the four terms aforesaid, 33*s.* 5*d.*, to wit, at every term 8*s.* 4½*d.*"

" The mill of Wallan, the mill of Porthmelyn, the land of Wallan, which contains 160 acres of waste, and the pasture in the wood which William de Pafford lately held, as is contained in the extent, for which he was used to render by the year 93*s.* 4*d.* by parcels, with 20*s.* 9*d.* of old increase, are not yet let, because tenants cannot as yet be found for the whole, nor for parcel of the same, at so high a rent, inasmuch as the said tenement, by the aforesaid William, was all burnt, and the mills much injured, as it is said, &c.; therefore let them be let by the steward *ad terminum conventionis, seu alio modo appruare (a) potest, &c.*; moreover, let the reeve answer for the issues, &c. The fishery, which is extended at 4*s.*, is not let, because no such profit could be there found beyond the ferry only, which is let as above; therefore, if the fishery be found there, it shall be let by the steward; if, &c.; but if, &c., the reeve, &c., by discretion of the same. Sum

Tenements  
not yet let.

(a) As to this term, *vide ante*, 185 (a).



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of all the fines 30*l.* 7*s.* 6*d.*, whereof of tallage 18*s.* 4*d.*, besides the tenements not yet let as above, to be paid at six terms of Easter and St. Michael next coming, by equal portions, the first term of payment beginning at the Feast of Easter in the eighth year, as is fixed by the lord's letter as is contained in the roll in Helston in Kyrrier, and thus at every term 10*l.* 3*d.*"

Extracts from the assession rolls of the other manors were then read, containing entries of the same tenements let to free and native conventionaries, the former doing free, the latter native fealty. It appears from these that the tenements were taken from seven years to seven years; that sureties were given; that tenements were not let, for want of tenants; that the tenants undertook to keep up the messuages, to manure the land, not to commit waste, and to surrender at end of the term. There were also many instances of increase of the rents; amongst these was an entry, in the assession of Calstock, of a taking by Backhampton and wife of a messuage and thirty-three acres of land, which William Drake, a bondman, *et impotens*, held. The steward to tally the covenant by writing, and retain it in his hands.

In the assession of the manor of Helleston in Kerrier, the last entry under the head of "Free Conventionaries," is as follows:—"Lawrence Hobba and John de Parhelles hold the toll of tin, with the chace in the manor, for the time as above, *in conventionione*, rendering therefore by the year, at the same terms, 8 marks.

In the assession of the manor of Penlyne, under the head of "Tenements not yet let," is the following entry:—"Four acres of land, which Henry the carpenter holds at Langueythech for 3*s.* a year, as is shewn by the extent, are not yet let, because he does not hold any other lands there, as it is said, but holds of the lord certain tenements at Lostwythiel, for which he renders to the lord by the year

the rent aforesaid, not *in conventione* but in fee, as it is said, and nothing therefore shews. It shall therefore be let by the steward, unless any thing, &c.; but if the reeve, &c.

In the assession of Tybesta, it appeared that lands formerly let to the burgesses of Grampound for years, are omitted, on account of an agreement entered into between them and the earl's council, under which they were to hold the land in fee farm (a).

In the assession of the manors of Moreske and Clymesland it appeared, from marginal entries, that the tenants of certain tenements had taken them for the term of their lives, which in the next had been demised for years.

In the assession of Moreske, Richard de Backhampton, (whose name is written over an erasure of "Ralf Herberd," a native of stock,) "holds for term of life, by the lord's charter, one messuage, five acres of land in one ferling of land Cornish, rendering by the year 5s. 6d., and he gives to the lord for tallage, &c. And because the said land lies within the demesne lands uncultivated, it was ordered by the lord's council that it be taken into the demesne, as contained in the extent. It is now ordered, that if it shall be taken, the same Ralf shall receive of the lord land in Coyspark or next Coysdaues, according to the value of the tenement; to hold at the will of the lord in villenage as of stock, &c."

In Clymesland, John Lobec takes a messuage, which "Walter de Laye *minus sufficiens, adhuc tenet* in Laye," to hold *in conventione* (b).

John Byle also takes a messuage, which "Richard Putte *impotens, adhuc tenet*."

John Turnour takes a messuage *in conventione* for years; and in the margin is written, "for term of his life and of Agnes his wife, by a fine of 100s." This tenancy is mentioned as being for life, in the caption of seisin (c), and in the assession roll of 21 *Edw.* 3.

Robert de Coheynton takes the land of a native of stock,

(a) See this transaction at large, Mann. Exch. Pract. 2d ed. 368, n.

(b) *Ibid.* 369, n.

(c) *Ante*, 156.

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deceased, in *liberâ conventione*, during the minority of the *proxima sequela*. Similar entries appear in the assession roll, 21 *Edw.* 3, of the manors of Calestock and Trematon.

Mr. *G. Harrison* then stated that the assession roll of 14 *Ed.* 3 was not to be found. He produced the accounts of the ministers and reeves of the manor of Tewington (*a*). The first which was put in was the account of Roger de Castle Goithon, the reeve of Tewington, in the years 15 & 16 *Ed.* 3. He begins with charging himself with the rent of assize, and fine of tin. After that follows an account of the rents and farms of conventionaries for divers lands and tenements of the demesnes of the lord there, to them assessed before Joseph de Wodestock and his fellows, for the term of seven years, this being the second year. The sum is stated to be 18*l.* 8*s.* 1½*d.* Under the head of issues of the manor, he states that he had received nothing for toll of tin, because none had been worked there. It appears from the account that the fine was payable in four years. Amongst the discharges are, for the rents of such tenements as were still in the lord's hands not demised.

The account of Eustace Pounder (*a*), reeve of Tewington, in the 18 & 19 *Ed.* 3, was then put in and read; which was similar to that of Roger de Castle Goithon.

After this the assession roll, 21 *Ed.* 3, was produced (*a*), and translated extracts from it read. It was entitled, "The assession and arrentation of the lands of the Lord Edward, Prince of Wales, Duke of Cornwall, and Earl of Chester, first born son of the Lord Edward, the 3d after the conquest, King of England, in the 21st year. Which assession and arrentation were made in Cornwall of the lands of the same Lord Duke, in the same county, in the months of April and May in the year aforesaid, by Sir Edmund de Kendal, Knt. steward of the lands of the same Lord the Duke, in Cornwall, Nicholas Pynok, one of the auditors (*b*) of the ministers of the aforesaid Lord the Prince and Duke, John de Mounthyroun and John Dabernoun,

(*a*) From the Duchy Office.

(*b*) *Ante*, 171.

hereunto assigned by the letters of the said Lord the Prince, in these words:—Edward, eldest son of the noble King of England and France, Prince of Wales, Duke of Cornwall, and Earl of Chester, to our dear and well-beloved Sir Edmund de Kendal, Masters Nicholas Pynok, John de Mountnyroun, and John Dabernoun, greeting. Whereas lately by our commission made to Sir James de Wodestock and others therein named, we caused our lands in Cornwall to be let for the term of seven years, which will shortly be ended; and we especially confiding in your loyalty, judgment and advice, have assigned you, three or two of you, of whom we will that the said Master Nicholas should be one, to let and arrent all our said lands, as well those which have been heretofore let to our free tenants as to our villeins, to sufficient and proper persons, for term of life or for years; and the fines of the tenements which you shall let for term of life, which used to be made for the term of seven years, to put in certain rent, to be paid yearly at the usual terms, according as you shall think best to be done most for our profit, so that no tenant do make alienation of his tenement without our leave; and that every time the rent of any tenement shall be in arrear for one month after the term assigned, and sufficient distress be not then found, it shall be lawful for us and our heirs to enter the same tenement and do therewith our will; ratifying and confirming whatsoever you, three, or two of you, of whom we will that the said Master Nicholas shall be one, shall do in the business aforesaid. We command that you, three, or two of you, of whom, &c., do cause to be performed and dispatch all the matters aforesaid, thereupon certifying concerning the said business performed distinctly and openly by your letters what you shall have thereupon done, and what proceedings you have taken in the business aforesaid. In witness whereof we have caused to be made these our letters-patent. Given under our privy seal at Westminster the 17th day of March, in the year of the reign of our most dear lord and father the King, of England the 21st, and of France the 8th.”

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The first entry of the takings of the free conventionaries in Tewington was as follows:—

“ Merthyn. Nicholas Wysa hath taken 1 messuage, 7 acres of land English in one ferling of land Cornish, which the same before held in Merthyn; To hold *in conventione* from the Feast of St. Michael next after the date of these presents, unto the end of 7 years next following, rendering by the year 7s. 9d. at the aforesaid four terms, and a certain rent Fine, 13s. 4d. called a fine of tin, and other services, &c.; and he gives to the lord for a fine, &c.; and he hath done fealty, &c. Sureties, John Myght and Nicholas Coty.”

Another entry of the same takings was as follows:—

“ Lawrence Durant, Robert Boghera, John Boghera, and John Wyda, have taken between them 6 acres of land in Penverten, newly recovered out of the extent and admeasurement, and before concealed, and to them assessed by the same assessors of the lands of the Prince; to hold, &c.”

A similar entry of the taking of David Coush and Roger Thorney was also read.

The entries of the takings of Nansmelyn were then read; the first of which was as follows:—

“ Nansmelyn. Philip de Nansmelyn hath taken 1 messuage, 11 acres of land English in half an acre Cornish, which the same before held at Nansmelyn; To hold, &c., rendering therefore by the year 11s. at the aforesaid four terms, suit and all other, &c.; and he gives for a fine, &c.; and he hath done fealty, &c. Sureties, Nicholas Coty and John de Nansemelyn.”

The others were similar, except that it appeared that one tenement had been divided into two (*a*), and the rent and fine equally apportioned.

(*a*) *Post*, Appendix, E.

From the assession of the manor of Calestock, it appeared that land of the *sequela* of a villein under age was demised *in liberâ conventionione*. The same also appeared from the assession of the manor of Trematon.

From the assession of Liskeard the following entry was read:

“Tremaba. John, son of Ralph (Ranulf) of Tremaba, a villein of stock (*a*), who at the last assession was admitted to one messuage, 60 acres of land in one acre Cornish, by fine of 4*l.* made by the friends of the same John, he then being within age, as is contained in the roll of the said assession, now of full age, comes and prays to be admitted to the said tenure, to hold in the same manner as his ancestors before held; and because it appears by the record of Rolls of the said assession, and by an inquisition thereof taken now before the assessors of the lands, that he is the heir of the said Ralph, and that by fine, he being within age, before had entry, it is now granted to him; To hold in form of stock (*b*), &c., rendering therefore by the year 5*s.* 6*d.* at the four terms; and he gives for tallage, &c.

From the assession of Tybesta it appeared that John de Penskawen, a free conventionalary, had previously taken a tenement from the steward of the manor; and that the bailiwick (*c*) of Poudre was let *in conventionione*.

From the assession of Helston in Kerrier, it appeared that toll of tin, and a blowing-house, were let *in conventionione* to Lawrence Hobba.

The following entry of the taking of a free conventionalary in Helston in Trigg, was read.

John Christopher has taken one messuage, 11 acres of land in one ferling of land Cornish, which the same before held, at the Ford; To hold *in conventionione*, from the Feast of Saint Michael next ensuing after the making of these pre-

- |                                           |                                         |
|-------------------------------------------|-----------------------------------------|
| ( <i>a</i> ) Nativus de stipite.          | taken of the circumstance of this       |
| ( <i>b</i> ) In formâ stipitis.           | being the demise of an incorporeal      |
| ( <i>c</i> ) No notice seems to have been | hereditament <i>in conventionione</i> . |

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sents unto the end of seven years next following, rendering therefore by the year 5s. at the four usual terms; and he shall do suit at the Lord's Court from three weeks to three weeks; and he shall be reeve, beadle, and tythingman when he shall be elected; and he shall chase and he shall find stabling when the lord or any in his name shall choose to hunt; and when the old park shall be turned into arable land, he and his fellows shall plough according to the quantity of their tenure(a), namely, he who holds half an acre of land Cornish shall plough half an acre English, and he shall have for ploughing one halfpenny; and he shall reap there for one day with one man in autumn, and shall take for the one day's work one penny; and when he shall die, the lord shall have his best beast in the name of a heriot; and he shall have nothing of his chattels; and he gives to the lord for a fine, &c.; and he hath done fealty, &c.

From the assession of the same manor, it appeared that some demesnes were let for lives; that Laurence Godalming took land in *liberâ conventionē*, *propter impotentiam* of a native of stock; and that land held in *liberâ conventionē* was restored to a native of stock; and that Warren Tregewethian and Anastatius, son of Robert Atteschole, and John his son, took several tenements previously held in *liberâ conventionē* and in *nativâ conventionē*; to hold for term of their lives, rendering by the year 50s. as the former tenants used; and that they gave to the lord for a fine 10*l.* to have a charter.

It also appeared, from reading the assession rolls of the several manors, that lands not let at the former assession were demised at this assession; and that it was provided that the villeins of stock should not send their sons to school, nor marry their daughters, without the lord's licence(b).

(a) *Ante*, 181.

(b) A villein on whom holy orders were conferred was thereby emancipated; as was a neife marrying a freeman. Bract. l. 4, c. 21; Co. Litt. 123 a. In the court rolls

of the manor of Westhey and Northstoke, in Hayling Island, temp. *Edw. 3*, *Rich. 2*, and *Hen. 4*, amercements for marrying without licence very frequently occur, and are always assessed at 12*d.*

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Mr. *Vanderzee* stated, that upon looking through the caption of seisin, he observed mention of tin fines in the manor of Tewington only.

After this were put in further accounts of the ministers or réeves of the manor of Tewington (b).

The first was the account of John Simund, reeve there, in the 22d year of *Ed. 3*. It appeared that he accounted for "26*l.* 13*s.* 5½*d.* for the rents or farm of conventionaries for divers lands and tenements so to them assessed before Edmund de Kendal and his fellows for the term of seven years, this being the second year, as is contained in the assession roll." It also appeared, that for part of the fines reserved, "he renders nothing here, because the said fines cannot be levied, for that the greater part of the tenants are dead by the pestilence happening in this year, before the Feast of Easter, and the rest of the tenants who are yet living wish to leave their tenures by reason of poverty, if they cannot have a release of the same fine; and so the same fine hath been remitted to them by the lord's council, in order that the tenements may not be empty." (c) Allowances are also made for part of "the rent of free conventionaries, whose tenements came into the hands of the lord on their death during the pestilence, whereof the reeve could levy nothing through poverty, as hath been found by an inquisition taken by the auditor."

The account of Pascoe Trevisec, reeve of Tewington, in 23 *Ed. 3*; from which it appeared, that for part of the fine of the free conventionaries reserved at the assession before

(a) Friday, Nov. 21, 1828.

(b) From the Duchy Office.

(c) Among other discharges, is one by payment to Tydeman de Limburgh. In Cotton's Records, p. 56, it appears that in 21 *Ed. 3*, the merchants complain that "the tin in Cornwall may now be bought

but of one stranger, Tydeman of Limburgh." Answer—"This is a profit belonging to the prince; and every lord may make a profit of his own." And see the Petition and Answer at length, 2 Rot. Parl. 172, and the petition of the inhabitants of Bodmin, *ib.* 180.



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Edmund de Kendal and others, "he renders nothing, because the said fine could not be levied, by reason that the greatest part of the tenants are dead, through the pestilence happening in, &c., the rest of the tenants, who are yet living, wish to leave their tenures by reason of poverty, if they cannot have a release of the said fine, and so the said fine hath been remitted to them by the lord's council, in order that the tenements might not be empty." Other tenements are stated to have been let to conventionaries at reduced rents, by reason of the pestilence.

From the account of Pascoe Trevisec, reeve of Tewington, 24 *Edw. 3*, it appeared that he discharged himself of payment of several sums, parcel of the rent of 26*l.* 13*s.* 5½*d.*, because of many tenements of the conventionaries being then in the lord's hands for want of tenants, by reason of the pestilence and the poverty occasioned thereby. It appeared also that Sir William Dawbery, *knt.* and Nicholas Pynnok, clerk, had been assigned to let the tenements, being in the hands of the lord from such causes.

In an account of John Gwynon, reeve of Tewington, 26 *Edw. 3*, 6*s.* was allowed, which the steward had remitted to Pascoe de Porton, a free conventionary, on his taking a certain tenement in the hands of the lord, which was burnt by the preceding tenant, who had nothing in goods, and had fled. It also appeared that an allowance was made to the reeve of 2*s.* 3¾*d.*, for a fourth part of 9*s.* 3*d.*, of rents of villeins of stock, whose tenements were then *in conventionione*, and were let *in conventionione* by the steward, to hold as the other conventionaries.

Robert Rouse, reeve of Tewington, 29 *Edw. 3*, in his account, claimed to be allowed for rents unpaid or lowered by reason of the death, desertion, or poverty of the tenants, in consequence of the pestilence, also for the remitted portion of fines.

It was proved that no assession roll of 30 *Edw. 3* was to be found.

The account of John Gilloun, reeve of Tewington,

31 *Edw. 3*, was then produced. It was therein stated, that "the same renders for 2*sl.* 0*s.* 10½*d.* for the rents or farms of conventionaries, as well free as native, with berbiage at every term, 117*s.* 6½*d.* for lands and tenements of the demesnes of the lord, so to them assessed before the aforesaid Nicholas and William, and their fellows, assessors of the lands of our Lord the Prince, for the term of seven years, as is contained in the roll of assession of the 30th year," &c., "this being the first year."

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The assession roll, 38 *Edw. 3*, (1364,) was then produced, and translated extracts from it were read. The commission was from "Edward, eldest son, &c. Prince of Aquitaine (a) and of Wales, Duke of Cornwall, Earl of Chester, to Master John de Delves," (and five others.) The commissioners are directed to let the tenements for life or years, to fix the rent, to restrain alienation without licence, and to stipulate for a power of re-entry, where there was no sufficient distress.

The entry of the taking of the first free conventionary of Tewington was as follows:

Merthyn. John Colyn, of Merthyn, a freeman, hath taken one messuage, 7 acres of land English in one ferling of land Cornish, which Felicia Wysa took at the last assession; To hold *in conventionie* from, &c., unto the end of seven years next following, rendering, &c.; and he shall do suit, &c.; and he gives for a fine, &c.;  
 Fine, 13*s.* 4*d.*

(a) By the peace of Bretigni, (1360,) *Edward 3* acquired the full sovereignty not only of Guienne and Gascony, which he had previously held as a feudatory of France, but also of the adjoining provinces of Poitou, Saintonge, Perigord, Agen, &c. *Vide 3 Rym. Fœd. part. 1 and 2; 5 Villaret, 226.* In 1362 this monarch erected the whole of these provinces into a principality, in favour of his son, the Black

Prince, conferring on him the title of "Prince of Aquitaine." *Froissart; 3 Rym. Fœd. part 3, p. 66, &c.* He is styled "Prince of Wales and of Aquitaine," in the summons to answer the complaints of the Agenois barons, issued in 1364 by *Charles 5*, affecting, notwithstanding the terms of the treaty, an appellate jurisdiction, as seigneur suzerain; the motive for the transposition being sufficiently obvious.

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by surety of David Merthyn and Walter  
 Prestre, 13s. 4d.

The entries respecting Nansmellyn were also read; the  
 first of which was,

Nansmelyn. " John Jurdan, a freeman, hath taken one  
 Fine, 33s. 4d. messuage, &c., which John de Nansmellyn  
 Increase, 13s. 4d. took at the last, &c., rendering by the year 11s.,  
 Because some other wished to have taken that at, &c., and he shall do suit, &c., and gives,  
 land, and each increased above the other up to that sum. &c. Pledges, John Simon and William  
 Nansmellyn."

From the entry of Robert Rouse, tenant of another por-  
 tion of Nansmellyn, it appeared his fine was increased 2s.

From the assession of the same manor was also read an  
 entry of the taking of

Trenewith. " Philip Symon, a freeman, rendering by  
 Fine, 20d. the year 5s. 3d., which Richard Nye took at  
 Decrease, 20d. the last assession; and it is allowed him that  
 Because this ten- he pay only one heriot for his two tenures,  
 ure remained a long time in the hands of the lord after this asses-  
 sion. because this tenure remained in the hands  
 of the lord after the assession."

And an entry of another taking of Philip Symon, in the  
 margin of which is written "decrease xxd., because all the  
 tenants of this vill have left their tenures." It appeared  
 also that many tenements were not let.

From some accounts of reeves of the manor in 40 & 43  
*Edw.* 3, which were next put in, it appeared that one of  
 those tenements remaining in the hands of the lord after the  
 assession, had been let for the term of the other conven-  
 tionaries, and the rent is brought into the accounts.

After these was put in the assession roll of 48 *Edw.* 3,  
 (1374,) from which translated extracts were read. The com-  
 mission began in these words:—"Edward, eldest son of the  
 King of England and France, Prince of Aquitaine and Wales,  
 Duke of Cornwall and Earl of Chester, Lord of Biscay (a)

(a) The sovereignty of Biscay is  
 called a lordship. The King of  
 Spain holds this province by the  
 title of "Señor de Vizcaya;" though

in 3 Rym. Fœd. 21 and 218, we  
 find treaties to which *Edw.* 3 and  
 the "Comes Vizcainæ" are parties.  
 In the treaty of Cabrerón in 1366,

and of the Castle of Ordiales, to our well-beloved servants William de Spridlington," &c., and was substantially the same as the last.

To the entry of the taking of John Jurdan, of Nansmellyn, was a marginal note, stating that the fine had been decreased half a mark, because it had been increased in the last assession by the envy of some other person bidding against him in that assession (*a*). It appeared also that the fine of Robert Rous, which before was 22s., had been decreased 2s. in this assession. There are several instances of the fines being decreased, and in some cases altogether remitted, in this assession, on account of the poverty of the tenants; it was stated that many tenements remained in the hands of the lord for want of tenants, and that the rents of free conventionaries was 21*l.* 16*s.* 10½*d.*

It was stated by Mr. *G. Harrison*, that there were no assession rolls in the duchy office between that of 45 *Edw.* 3 and 5 *Hen.* 6. The last-mentioned roll was produced, and appeared to be imperfect, the manor of Tewington not being included in it. The commission was directed to Juyn, Chief Baron, and others.

The ministers' or reeves' accounts for a great part of the above period were also wanting. From that of Philip Rogger, reeve of Tewington, 38 *Hen.* 6, (*b*) it appeared that the rents of free and native conventionaries amounted to 17*l.* 15*s.* 4*d.*; that the fine was payable in six years; and that some tenements had been taken after the assession. Under the head of "lands and tenements remaining in the hands of the lord after the assession," was this entry, "and for 4*s.* of the issues of a messuage and 11 acres of land English in Nansmellyn, which so used to render by the year, and for fine nothing remaining, as above."

between Edward the Black Prince and Peter the Cruel, the lordship of Biscay was the stipulated price of Edward's assistance in restoring Peter to the throne of Castille, (see Mariana, *Hist. de España*, lib. 17,

cap. 10;) a service which he performed in the following year, when Henry and his French auxiliaries were defeated at Najara; *ib.* cap. 11.

(*a*) *Ante*, 193.

(*b*) From the Duchy Office.

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The assession rolls of 2 *Edw.* 4 and 9 *Edw.* 4 were put in (a); neither of these contained any assession of Tewington. Short extracts from them were read, by which it appeared that some tenements were let for twenty-one years; that in some cases there was a provision that the tenant should reside on the demised premises; and that allowances were made for fences. An escheat was stated to have been demised in convention. The latter assession roll is remarkable as being the first in which there are any entries of the *holdings* of free tenants in some (b) of the manors.

From the account of John Colyn, reeve of Tewington, 18 *Edw.* 4, (a) it appeared that the then rent of the conventionaries, as well free as native, was 11*l.* 11*s.* 10½*d.*; that the toll of tin was 55*s.* 4*d.*; and that divers lauds and tenements had been demised to various persons after the assession.

From that of Richard George, reeve of the same manor, 20 *Edw.* 4, (a) it appeared that there had been a recent assession, at which the reserved rent of the free and native conventionaries was 19*l.* 2*s.* 2½*d.*, and that the toll tin was returned at 6*l.* 1*s.*

The assession roll, 9 *Hen.* 7, (a) was stated to be the first extant roll, after that of 45 *Edw.* 3, in which the assession of the manor of Tewington is contained. On the production of this roll it appeared that the commission was not inrolled with it.

Translated extracts from the roll of Tewington were read, among which were the following entries:

Tewyn. " Philip Hoky, a freeman, took one messuage, which the same Philip took at the last assession; To hold from the Feast of St. Michael the Archangel, in the 9th year of the reign of the now King *Henry* 7, unto the end of the term of 7 years from thence next ensuing, and fully to be completed, rendering therefore yearly 8*s.*, payable equally at

(a) From the Duchy Office.

(b) *Vide post*, 202.

Fine, 6s.

the four principal terms of the year; and he gives to the lord for a fine 6s. payable within the 6 years now next coming, viz. at the Feasts of Easter and St. Michael, by equal portions; and he shall do suit at the Court of the lord from three weeks to three weeks; and he shall be reeve, bedell, and tithing-man, when he shall be elected by the homage; and he shall drive the distresses taken to the use of the lord, and shall impound the same in the due and accustomed place; and when he shall die, the lord shall have his best beast in the name of a heriot; and he shall sustain the houses and inclosures, and uphold his tenure, at his own proper costs and expenses; and at the end of the term aforesaid, the same well and sufficiently repaired shall give up: and he shall do all other services to the lord, according to the custom of the manor aforesaid; and he did fealty to the lord, by the pledge of John Phelippe and Benedict Lao."

Nansmellyn.

"John Michell took one messuage there, late of John Porth, and which the said John Michell took at the last assession; To hold as above, rendering therefore yearly 7s. 6d. at the same terms; and he does all services as above; and he gives to the lord for a fine nothing; by pledge of John Dadowe and John Rawett."

Fine, nothing.

"The same John Michell and John Colyn took one messuage and 11 acres of land English there, late in the tenure of Roger Symon, and which the said John and John took at the last assession; To hold as above, rendering therefore yearly 10s. at the same terms: and he does all services as above; and

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Fine, nothing. he gives to the lord for a fine nothing; by his aforesaid pledge."

The next portion of Nansmellyn was similar to the last above in the amount of the rent and the absence of the fine. The rent of the 4th portion was 9s., the fine nothing.

The following entries were also read:

A Stone Quarry. "The said John Higgeman took a quarry there called Freston, heretofore in the tenure of the said James Chideley and John Plum-payn, and which John Hegeman took at the last assession; To hold as above, rendering therefore yearly 16*d.* at the same terms; and he does all services as above; and he gives to the lord for a fine nothing; by his aforesaid pledge.

Another Stone Quarry. "The same Richard Pentowe took another stone quarry there called Helyngston(*a*), which the said John Hegeman and William Jamys took at the last assession; To hold as above, rendering therefore yearly 20*d.* at the same terms; and he does all services as above; and he gives to the lord for a fine nothing; by his aforesaid pledge."

Mr. *Illingworth* was here called, who said he had looked through the assession rolls of Tewington which were extant previous to this, and that in them no mention was made of any quarry.

The rents of the tenants, "as well free as customary," amounted to 16*l.* 19s. 9½*d.*

The assession roll, 16 *Hen.* 7, was next produced; the freeholders of Tewington were therein mentioned for the first time(*b*). The rents of the first three portions of Nansmelyn were 11s. each, of the fourth 9s. The fine of the first portion was 3s. 4*d.*, of the second and third 5s., of the fourth nothing.

From the account of John Philip, reeve of Tewington, 23 *Hen.* 7, which was next produced (*c*), it appeared that

(*a*) i. e. roofing stone. *Vide post*, sixth day.

(*b*) *Vide ante*, 200.

(*c*) From the Duchy Office.

the rents and farms of conventionaries then amounted to 20*l.* 4*s.* 3½*d.*, and the following entry was read:—"For any money by the said accountant this year received for toll tin there, namely, from the said time of this account, because that toll tin, together with the toll tin in Tywarnayle and Helston in Kerrier, was demised to Peter Beryle, esquire, for the term of seven years, for 14*l.* by the year, by the commissioners of our lord the king, and charged in the account of Richard Nanson, knight, receiver general of the said lord the king of his said duchy of Cornwall, in a title by itself, as appears in the same account of the twenty-third year of King Henry the Seventh, this being the third year of the term aforesaid. Sum, nothing."

From the assession roll of 2 *Hen.* 8, the following, amongst other translated extracts, was read. From the roll of Tybeste-mure:

|                                                                |                                                                                                                                                                                                                               |
|----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Grauntpound<br>Quarry.<br>Rent, 20 <i>d.</i><br>Fine, nothing. | " William Michell hath taken one quarry there, newly found within the tenure of William Michell there, for term of seven years, rendering therefore by the year, at the usual terms, 20 <i>d.</i> , by his aforesaid pledge." |
|----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

From that of Trematon, in 20 *Hen.* 8, the following was read:

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Penfentell.<br>Rent, 8 <i>s.</i><br>Fine, 60 <i>s.</i> | " John Pethyn, a freeman, son of John Pethyn, (his mother being alive,) hath taken that tenure which John Pethyn, his father, took at the last assession, rendering therefore by the year 8 <i>s.</i> , and for fine 60 <i>s.</i> And he did fealty to the lord by his pledge aforesaid. And by covenant ( <i>per conventionem</i> ) the same John shall well and sufficiently repair the same tenement, and shall keep house upon the same, or shall make some other sufficient tenant to reside, within three years next ensuing, on pain of forfeiture of his aforesaid tenure, and 40 <i>s.</i> to be forfeited to the lord the king, and to be levied upon his goods and chattels. By the pledge of Pasco Tre- |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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Received a new,  
 as well for the  
 forfeiture of the  
 aforesaid tenure  
 as for a propor-  
 tion, 7*l*.

villa and Nicholas Kympe. And moreover it is agreed, that if the said John shall die without heir of his body lawfully begotten, or if the said John shall alienate his aforesaid tenure, or if the said conventions on the part of the said John shall not be well and faithfully fulfilled, then William Wray shall have the same tenure, on the conditions aforesaid, in manner and form above written, paying to the aforesaid Pasco Trevilla, 100*s*."

As was also the following entry from the roll of Tewington, in the same year:

Nansmellyn.  
 Rent, 11*s*.  
 Fine, 5*s*.

New acknow-  
 ledgment for  
 Webbe's part,  
 11*s*. 10*d*.

" Vivian Rawlyn and John Webbe, (the son of the widow of Mark West, being alive,) have taken one messuage and 11 acres of land English, in half an acre of land Cornish there, which Richard Rawlyn and Isabel, the relict of Mark West, took at the last assession," &c.

From the assession roll, 27 *Hen.* 8, the following translated extracts were read. From the Trematon roll:

Stocken.  
 Rent, 10*s*.  
 Fine, 36*s*. 10*d*.

New acknow-  
 ledgment, in the  
 name of fine, 20*s*.

" Thomas Skelton, a freeman, hath taken that tenure out of the hands of the lord the king, by reason of forfeiture of the same Thomas committed, in the cutting down 12 oaks on his tenure, contrary to the custom of the manor, as hath been presented by the homage; which the said Thomas took at the last assession, rendering therefore yearly 10*s*., and for fine 36*s*. 10*d*., as above; and he shall do all other services as above; and he hath done fealty to the lord, by pledge of John Mone and Richard Rede."

Corn Mill.  
 Rent, 53*s*. 4*d*.

New acknow-  
 ledgment, 6*s*. 8*d*.

" John Thomas, serjeant at arms of the lord the king, hath taken out of the hands of the lord the king, by reason of the forfeiture of William Trenowe, because he de-

mised the said corn mill to one John Champion, by indenture, for the term of 14 years, contrary to the custom of this manor, as hath been certified by the homage. And by the consent and will of the said William Trenowe, before the commissioners upon this assession, he hath taken one corn mill near the castle of Trematon, called Fresch Mill, and the site of the fulling mill there, called Fulling Mill, which William Trenowe took at the last assession, rendering therefore yearly 53s. 4d., at two terms of the year equally, and reserving to the lord the prince the rents of the burgesses of Trematon(a), the fines, reliefs, amerciaments, and other profits whatsoever, pertaining or belonging to the said lord the prince, from the burgages aforesaid. Nevertheless, those profits, with the mills aforesaid, were lately let to farm, as it is said. And the said John shall well and sufficiently repair the said mills at his own costs in all things, at and continually during the said term, and at the end of the said term shall leave, &c., timber excepted, with the service and works which the tenants ought to do to the aforesaid mill by custom. And he gives to the lord for old acknowledgment 6s. 8d., to be paid in the first year, by the pledges aforesaid."

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From the Helleston in Kerrier roll:

|                                                |                                                  |
|------------------------------------------------|--------------------------------------------------|
| Roslyn.                                        | " John Hamor, a freeman, hath taken out          |
| Rent, 22s.                                     | of the hands of the lord the king, the whole     |
| Old acknowledgment, 4d.                        | town there, which the same John took at the      |
| New acknowledgment in the name of a fine, 44s. | last assession, rendering therefore yearly 22s., |
|                                                | at the same terms, and for fine nothing; and     |
|                                                | he shall do all other services as above; and     |
|                                                | for old acknowledgment 4d. And it is pre-        |
|                                                | sented by the homage that the said John          |

(a) i. e. Saltash.

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Hamor, on his own account, hath dug tin upon the lands of the several parts of his tenure, and hath permitted divers other persons likewise to dig upon the said tenure, contrary to the custom of the manor. Therefore he hath forfeited his said tenure in manner as hath been presented by the said homage in this behalf sworn among other things. However, by consideration of the commissioners, it is granted to him by paying a fine of 44s., as appears in the margin; and by covenant the same John shall fill up, or cause to be filled up, the shafts made upon his tenure aforesaid, for getting tin within the term aforesaid. And furthermore, he shall not hereafter dig, or permit any other to dig, without licence of the lord the king, or his officers, on pain of forfeiture of his tenure aforesaid, and 20*l.* to be forfeited to the use of the same lord the king, to be levied upon his goods and chattels, by pledge of John Nanslo and Simon Meuche."

Corsposte.  
 Rent, 8*s.*  
 Fine, nothing.  
 Old acknowledgment, 4*d.*  
 New acknowledgment, 16*s.*

"John Bodolgham, esquire, hath taken out of the hands of the lord the king, (by reason of the forfeiture of Richard Thomas for this, that he hath cut down and sold three oaks growing upon his tenure, contrary to the custom of the manor, in manner as hath been presented by the homage in this behalf among other things sworn,) the whole town there, late of Thomas Corsposte, and which the said Richard Thomas took at the last assession, to hold as above (*a*), rendering therefore yearly 8*s.*, at the same terms, and for fine nothing, and he shall do," &c.

From the Restormel roll:

"John Bullock, on the surrender of John

Rent, 14s. 6d.  
Fine, 12d.

Old acknow-  
ledgment, 4d.

New acknow-  
ledgment, 39s. 4d.

Because he for-  
feited the penalty  
above imposed at  
the last assession,  
for not repairing  
his aforesaid te-  
nure.

Cooke, a freeman, hath taken two tenures there, which the same John took at the last assession, to hold as above (a), rendering there-fore yearly 14s. 6d., with 20d. for lands called the Coppice, to the said tenure be-longing, &c. And by covenant (*per conven-tionem*) the same John shall well and suf-ficiently repair one tenure within three years next ensuing, on pain of his forfeiture of his aforesaid tenure, and 5 marks to be for-feited to the lord the king," &c.

From the assession roll of 5 *Eliz.* it appeared, that in the manor of Tewington the takings of the conventionaries were often recited to have been on a surrender.

From the Restormel roll of the — *Eliz.* the following translated entry was read:

" Thomas Helliard, son and heir of Jane his mother, on the surrender of John Carminowe, esq. hath taken two tenures, formerly in the tenure of John Sweet, which Elizabeth, relict of the late Thomas Carminowe, late tenant there, in her pure widowhood, hath forfeited, by reason that the said Elizabeth, in her said widowhood, made a lease of the said two tenures to one John Clotworthy, for the term of the life of the said Elizabeth, contrary to the custom of this manor, as sufficiently appeared and was proved before the commissioners of the lord the king at the time of the assession holden in the 34th year of the late king *Henry* the 8th, by a bill signed with the hand of the said Elizabeth, sewed to the roll of the last assession. Which two tenures, after the said forfeiture thereof, the lord the late king *Henry* the 8th, by his letters patent, the date whereof is the 4th day of February, in the

(a) These words refer to the first entry relating to the particular class of tenants.

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31st year of his Majesty's reign, of his especial grace gave and granted to John Trenounce, for the term of his life, without any thing to be therefore rendered, as in the said letters patent is more fully contained; and because the said John Trenounce before had and received of Thomas Hilliar, the father of John Hilliar and William Hilliar, 7*l.* sterling for all his right and title of and in the aforesaid two tenures to him granted by the letters patent of the lord the king; and afterwards of the same John Hilliar and William Hilliar, at the time of the last assession, for the like right and title, 10*l.* sterling, of which the said John Trenounce acknowledged himself to be fully paid and satisfied for every parcel thereof, he gave and delivered up into the hands of the commissioners the aforesaid letters patent of the lord the king, in the Exchequer of the said lord the king, of Lostwithiel, there to remain during his life, upon the following condition, to wit, that the said John Trenounce and his assigns, yearly and during his life, should receive and enjoy the rents of the said two tenures from of old time due, to be yearly paid by the hands of the reeve of Restormell for the time being: for which causes and considerations, manifestly proved and examined before the said commissioners, and also by reason that the said Thomas Hilliar, before the forfeiture aforesaid was known, paid for the said two tenures to Edward Clyker, seised of the same as in right of the aforesaid Elizabeth his wife, late wife of Thomas Carminowe, esq. deceased, 14*l.* 6*s.* 8*d.*, as by the acquittance of the said Edward Clyker, shewn before the commissioners aforesaid, more

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fully appears, the same commissioners of our lord the king demised the aforesaid two tenures to the said John Hilliar and William Hilliar, to hold to them according to the custom of the manor aforesaid. And because William Hilliar surrendered his part to the aforesaid John Hilliar his brother, by reason of which surrender the said tenure was entirely in the hands and possession of the said John Hilliar; which said John was hung at the time of the commotion in the 3d year of king *Edward* the 6th, for the crime of high treason; and all the goods and chattels of the said John Hilliar were given and granted by John Lord Russel, lord keeper of the king's privy signet, (by virtue of the king's commission to the said Lord Russel then directed, for repressing such like cases within the county of Cornwall,) to one William Kawannell, who, by agreement made between him and the aforesaid John Hilliar, restored all the goods of the said John Hilliar to the aforesaid Jane, his relict, as the said Jane possessed the same in her former state; and hereupon came the said Jane before the commissioners of the lord the king, and took the said tenures called Berneyate, and was admitted tenant according to the custom of the manor aforesaid, rendering therefore yearly 8s. 10d. at the same terms; and for fine 12d., and for old acknowledgment 8d.; by pledge of Robert Hamlyn and John Lad."

Rent, 8s. 10d.  
 Fine, 12s.

Old acknowledgment, 8d.

From the assession roll, 19 *Eliz.* the following entry of a taking of a Trematon conventionary was read:

Penfentell. "John Bawdon, by grant of the commissioners of the lady the queen, on the forfeiture of Richard Treville, for certain causes

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hereinafter specified, hath taken one messuage and 26 acres of land, which Richard Treville (saving the right of John Tilham) took at the last assession; to hold from the Feast of St. Michael the Archangel, in the 19th year of the lady *Elizabeth*, the now queen, unto the end of the term of seven years then next ensuing and fully to be completed, rendering therefore yearly 8s., and for fine 6*l.*, payable within the first six years of the said term, and in the seventh year he shall be thereof quit; and he shall do suit at the Court from three weeks to three weeks; and he shall be reeve, tithing man, and beadle, when he shall be elected; and as often as he shall be summoned, he shall find a man to take distresses within the hundred of Estwibleshire, to drive the distresses aforesaid to be impounded in the proper and accustomed place; and when he shall die the lord shall have the best beast for every of his tenures in the name of a heriot; and he hath done fealty to the lord; by pledge."

To which is subjoined the English note following:

"The consideration of granteing the said tenure to the sayde John Bowden, for the term of vij yeres, accordinge to the custome, is, for that the former takinge of the sayd Trevill was speciall, upon condicion expressed that he shoulde well and sufficientlie repaire the sayd messuage, and should continually dwell upon the same, or appoint some other sufficient tenante continually to dwell uppon the same, uppon pain of forfeiture, as by the session rolles, anno xxvij<sup>o</sup> R. H. vij<sup>er</sup>, and all other session rolles followinge, maye fulle appeare. W<sup>ch</sup> condicion beinge broken, (as before us the said commissioners in o<sup>r</sup> session

courte of Trematon was confessed by the tennaunte of the same, that the said tennaunts, nor any other sufficient tennaunte for him, did dwell uppon the same, accordinge to the said condicion,) and for that also it appeared to the said commissioners, the said Richard Trevill being tennaunte of the said customary tenamente, by his deede indented, bearing date the xvij<sup>th</sup> day of December, in the xvij yere of the Quene's Maties raigne, that nowe is, demised, granted, leased, and to ferme lett, the said customary tenement to one Roger Batten and his assigns, from vij yeres to vij yeres, to begyne after evry survey court w<sup>th</sup>in the said mannor, duringe soe manye yeres as the said Richard Treville shoulde fortune to lyve, by the rent of xxvj<sup>s</sup> viij<sup>d</sup>, contrary to the auncient custome and usage of the said duchie possessions, and for diverse other causes us moving and pt'ly shewed, and w<sup>th</sup> all for that the said John Bawden, nowe tennaunte of the said tenement, hath gyven for increase of fyne to her Ma'ties use the sume of three poundes over and above the olde accustomed fyne of three poundes; We therefore, the said commissioners, have admitted and allowed him to be tennaunte, accordinge to the customary devysinge and settinge aforesaide."

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It was stated by Mr. *G. Harrison* that few rolls were extant of the reigns of *James 1* and *Charles 1* (*a*); that from 1668 the commissions and assessions were transcribed in books as well as rolls till the year 1756, when the rolls ceased, and the proceedings were contained in books only.

(*a*) In the civil wars at the close of these reigns many duchy records are said to have perished by fire in the castle of Lostwithiel.



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By the assession book of 1773 for Tewington, under the head of Nansmellyn, it appeared that Edward Carthew, after the death of James Carthew his father, for twenty-two parts in forty-two parts divided, John Symons, in his own proper right, for the other twenty parts of the said forty-two parts, took one messuage and 12 acres of land English, and half an acre of land Cornish, to hold from the Feast day of St. Michael, in the thirteenth year, &c. to the end of the term of seven years; and so of the other three portions.

Assession book of 1780 contained similar entries as to Carthew. "John Pearce, by surrender of John Symons, for the other twenty parts of the said forty-two parts, took one messuage, &c., to hold as aforesaid. Rent 11s., fine 3s. 4d."

Assession book of 1787 brings the whole of Nansmellyn into Carthew and Pearce, who appeared also as tenants in 1794, which was the last assession of Tewington.

A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject to a full cross-examination.

Mr. *Illingworth* stated that he had examined the assession rolls and ministers' accounts from the time of *Edw. 3* down to the latest period, and that the rents of assize, rents of conventional tenants, fines of tin and tolls of tin, the old acknowledgments and new acknowledgments mentioned in the assession rolls and books, agreed with those mentioned in the ministers' accounts in almost every instance, with merely trifling deviations.

*Brougham* objected to the *result* of the witness's searches being received in evidence. The "trifling deviations" spoken of shew the danger of admitting evidence of this kind.

Lord TENTERDEN, C. J.—In evidence of this kind, I cannot agree to give the time which is necessary to compare Latin documents. The time of the Court would be occupied many months, if we were to go through them all in the way proposed. You have a right to cross-examine upon this as far as you please; but there is no doubt it is evidence, and the usual course.

The assession roll of 12 *Eliz.* was produced, and with it a paper entitled, "the answers of the tenants of the manors of Tewington, Penkneth, Restormel, and Penlyn, unto the interrogatories administered unto them by John Conyer, Esq.;" but the interrogatories were not produced.

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On an objection made to the admission of these answers without producing the interrogatories, and argued by *Brougham* and *Erskine*, it was suggested by the Court that a further search should be made for the latter. In the mean time the discussion as to the admissibility of the answers alone was postponed.

The defendant then proceeded to shew the title of the Duke of Cornwall to tin found under conventional tene-ments within the assessionable manors.

A charter to the tinnors of Cornwall, 3 *Joh.* (a), was first produced (b); after which were put in three charters of confirmation, of 33 *Edw.* 1, 18 *Ric.* 2, and 3 *Hen.* 4. (b)

The next document produced (b) was a charter, 23 *Hen.* 7, containing a pardon for certain offences against the stannary laws, and directions for holding the convocations, or parliaments, of the stannaries (c).

The roll of the convocation holden 26 *Geo.* 2, was given in evidence, after the production of the commission under the privy seal for holding such convocation, and of the royal warrant for issuing such commission. The roll itself, in which the acts of several previous convocations were recited and confirmed, being of an inconvenient size, it was agreed that extracts should be read from a printed copy. The following was first read:—"We present and affirm, that by common prescribed stannary right, any tinner may bound any wastrel lands within the county of Cornwall that are unbounded or void of lawful bounds, and also any several and inclosed land that hath been antiently bounded and assured for wastrel, by delivering of toll tin to the lord of the soil, before that the hedges were made upon it; and also such and so much of the

(a) Appendix, E.      (b) From the Tower.      (c) Appendix, F.

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Prince's several and inclosed customary land within the antient duchy assessionable manors, as hath been antiently bounded with turfs, according to the ancient custom and usage within the said several duchy manors, and not otherwise; the tinner paying out of such land so bounded the usual toll only as is generally paid within the stannaries, that is, the 15th dish or part, saving in such places where a special custom hath limited another rate of toll." (a)

Extracts were also read respecting the regulation of blowing houses in the stannaries, ordaining that the names of the owners should be exhibited to the steward of the Stannary Court, as also the names of the blowers; that the blowers should take a certain oath; that the quantity of tin blown should be certified, &c.

An inrolment in the office of the Duchy of Cornwall, of a lease purporting to be granted by the King, *vacante ducatu*, is primary evidence of such lease.

It was then proposed to put in the inrolment of a lease, 35 *Eliz.*, of the toll-tin within the manors of Helston in Kerrier, Tywarnhaile, and Tewington, to Gerard and another, for 21 years, inrolled in the book of inrolments in the duchy office.

After a short argument on the admissibility of this inrolment, in which the case of *Humble v. Hunt* (b) was referred to, the Court ruled, that the duchy office being the proper office for inrolment, and the duchy being in the Crown at the time of the making of the above-mentioned lease, the

(a) The custom of bounding appears to attach to land antiently wastrel, though part of such wastrel may have been inclosed since it was first bounded. If the bounds be not renewed yearly on the part of the original bound-owner, any other person may, on performance of certain terms, come in and possess himself of those bounds, or of part of them. The form of bounding consists in turning up turfs to shew the limits of the bounds; after which proceedings are taken in the Stannary Court, in order to assure the possession to the boulder.

The defendant contended that this custom was calculated to promote the working of mines, by allowing a stranger (the boulder) to enter and work them, and at the same time to secure to the owner of the soil a remuneration, by giving him a share of the produce in the shape of toll; and that if it could be shewn that the Duke of Cornwall did receive such toll from mines in the conventional land, it would be evidence that he was owner of the soil there.

(b) *Holt*, N. P. C. 601. And see *Coombs v. Coether*, 1 M. & M. 398.

inrolment of it was admissible. The inrolment of that lease, and that of several others containing demises of toll-tin in Tewington and in other manors, were then read. The last was dated August 15, 1810, to Smith, under whom the defendants claimed, as far as respected tin. Upon the two first leases no fines were payable, but an annual rent was reserved of 20*l.* 6*s.* 8*d.* The earliest fine amounted to the sum of 133*l.* 6*s.* 8*d.*, the latest to 18,500*l.*

Parol evidence was then given that the tollers of the several later lessees had taken toll of the tin won from Lamellyn Moor.

*John Williams Colenso* produced several tin bills, of one of which the following is a copy:

" No. 11.

St. Austell Old Blowing House, the 5th of February, 1787.

Mr. John Pearce, Happy-go-Luckey.

|            | C. qr. lb. | C.     | C. qr. lb.       | £.     | s.           | d.                   |
|------------|------------|--------|------------------|--------|--------------|----------------------|
| Sell Tin   | 14 2 1     | at 13½ | for 20 white, is | 9 3 3  | at 70 per C. | 34 4 4               |
| Stampd Do. | 8 0 18     | at 12½ | ditto . . .      | 4 3 27 | ditto . .    | 17 9 4               |
| Rough Do.  | 1 1 0      | at 10½ | ditto . . .      | 0 2 15 | ditto . .    | 2 4 4                |
|            |            |        |                  |        |              | <hr/> £53 18 0 <hr/> |

Mr. Carthew, Duchy Land.

Paid in full, per

HENRY LAKES."

On the back was indorsed,

" Full dues . . . £5 18*s.* . . .

Mr. Carthew ½ . . . 2 19

Mr. Carthew, received by me, TH<sup>o</sup> PROUD.

Received for Nich<sup>s</sup> Donnithorne, Esq. one moiety of the dues, £2 19*s.* J. PUCKINGHORN."

This witness stated that the tin mine agent was accustomed to take the produce of the mine to a blowing-house, where it was assayed by the owner, who gave an acknowledgment or tin bill to the agent, stating the quantity and quality, the mine from whence the metal was won, and the price which he was to give; that from this price a composition for the tolls, which in the above instance was 1-9th to the bounder and owner of the soil, was to be deducted; that

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their receipts of such toll were indorsed on the bill, in order that the agent might exhibit the bill, on accounting with the adventurers, as a charge against himself for what he had received from the owner of the blowing-house, and as a voucher for what he had paid for toll or dues; that the bills now produced were found amongst the papers of Mr. John Pearce, agent for the above-mentioned mine; that H. Lakes was clerk at the blowing-house; that Thomas Proud was clerk to Mr. Carthew; that the mine in question was under duchy land in Tewington, of which the Carthews were bounders. He also stated that the custom was to divide the dues between the owner of the soil and the bounder; that there was a known distinction in Cornwall between fee land and duchy land or ancient duchy; that ancient duchy consisted of the conventional tenements and wastes in the 17 manors already named; and that in fee land the owner of the fee and the bounder, in duchy land the lessee of the duke and the bounder, divided the dues.

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#### FOURTH DAY (a).

*J. W. Colenso* proved the payment of dues in kind from a tin stream work in Tewington, called Wheal Virgin.

*William Pearce*, of whom *Lamellyn* had been purchased by the plaintiff's testator, proved that his father, the former owner of the estate as mortgagee in possession, had attended the Assession Court and collected money as reeve of the manor, and that he himself had paid Prince's rent; that he sold the estate for 1450*l.*, and had no idea that he was selling the chance of any copper mines; and that, if the copper had been sold with it, the estate would have been worth 10,000*l.* instead of 1450*l.*; that he supposed he was selling an interest which did not include the minerals; that the copper lode in *Lamellyn Moor* had been in his time laid open by

(a) Saturday, November 22, 1828.

the Sandry-Cocks streamers, but that it was then supposed to be mundic; that East-Crinis mine was at work at the time of the sale. This witness proved that the term "assessionable manor," and the distinction between "fee land" and "duchy land," are well known in Cornwall.

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The defendant then entered upon a new head of evidence (*a*), and proceeded to shew the title of the Duke of Cornwall to all other minerals, except gold and silver, within the duchy, and put in a lease dated 10th July, 1697, whereby, in consideration of the great costs and expenses incurred by Henry Vincent and Francis Scobell, Esqrs., in the opening and working of the mines of minerals therein demised, and of the rents and covenants, the King (*Will. 3.*) demised to Vincent and Scobell all mines and minerals within the lordships, manors, precincts, or territories of the Duchy of Cornwall, (except royal mines and mines of tin and all other minerals within, &c. granted to any person or persons by letters-patent under the great seal, or Exchequer seal, and all tolls, farms, and other dues to the King or the farmers there belonging, growing, or renewing, by any custom or demise theretofore made,) *habendum* for 31 years; rendering to the King or to the Duke of Cornwall, one full tenth part of the clear annual profit of, &c., to be accounted for by them upon oath before the auditor (*b*) of the Duchy of Cornwall, to be paid into the hands of the receiver-general of the duchy at, &c. Covenant by the lessees not to enter upon any lands in the tenure or possession of any tenants of the duchy aforesaid, or of any person whatsoever, without the consent and permission of the tenant and occupiers. Proviso, that if the letters-patent should not be inrolled within the space of six months after the date, before the auditor of the duchy, that demise and grant should be void.

After that an inrolment of a lease, 3d March, 1717, to Rebecca Vincent and Francis Scobell, was offered in evidence; on which

(*a*) Copper leases.

(*b*) *Ante*, 171.

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in the duchy  
office of a lease  
purporting  
to be granted  
by the Duke  
of Cornwall,  
is primary  
evidence  
of such lease.

*Brougham* objected that the original lease should be produced. He argued, that when the inrolment now offered was made, the duchy was not in the Crown. A Duke of Cornwall was in existence, who was a subject. The case is therefore one to which the rules of law applicable to the property of the Crown cannot be extended. If so it will be found that the case does not come within the principle of that of *Humble v. Hunt*, relied upon on the other side, in which the inrolment was received as secondary evidence. In that case Mr. Serjt. *Hullock* and myself objected that it was only secondary evidence, and that, as secondary evidence, it could not be received. The answer was, that it was an inrolment in a County Palatine, which had *jura regalia*, and its own records. On this ground an inrolment in the office, made by the proper officer, was held to be sufficient evidence of the lease which purported to be inrolled; but it was considered only as evidence of the contents of a lease which had been lost. Here no evidence of loss has been given.

*Patteson, ad idem.* In *Kinnersley v. Orpe* (a) it was said that the account of a duchy officer would be evidence of a fact. That case does not apply to the present objection. That was an action for trespass in a fishery, where the plaintiff's title was under a lease from the Duchy of Lancaster. The lease was produced, and it contained a proviso that it should be inrolled. To prove the inrolment, they shewed a memorandum in the margin by the auditor. This was taken to be sufficient evidence of the inrolment. There, however, the inrolment was not produced as evidence of the lease; but the signature of the auditor was held to be evidence that the lease had been inrolled pursuant to the proviso. In that case also the lease was admitted by the pleadings, so that the present point did not there arise.

(a) Dougl. 56.

*Wetherell, A.G.*, in answer to the objection, The Crown for its safety must have a record of its interest. Here the Crown has at least a reversion. It would be unreasonable to make the admissibility of the evidence depend upon the circumstance of the property being in the Duke or in the Crown.

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Lord TENTERDEN, C. J., interrupted the argument, to inquire of *Mr. G. Harrison* whether, when a lease is inrolled, any fee is paid to the officers of the duchy.

*Mr. G. Harrison* stated that a fee was paid, and received in part by himself, though he could not speak with certainty as to its amount.

*Sir J. Scarlett, ad idem.* This evidence is admissible on two distinct grounds. I cannot agree that the Court is not to look at the title in any other way than as if the Duke of Cornwall were a private subject. The duchy is created by act of parliament, as a provision for the eldest son of the King. The Court is bound to know that there is a duchy court and a duchy office, and that the affairs of the duchy are kept on record in that office, as they are in the Duchy of Lancaster. The manner and form of keeping the records in the duchy office is as much receivable in evidence as if the duchy were in the immediate possession of the Crown. Another ground for the reception of the inrolment is, that it is the proper evidence; because, as in the case of *Kinnersley v. Orpe*, the lease has no validity unless it be inrolled; any other evidence, therefore, would be open to the objection, that although you produce the lease, unless you shew the inrolment, your lease is of no value. The lease itself, therefore, cannot be given in evidence without shewing the inrolment, or proving, by the indorsement of the proper officer, that it was inrolled. In the case of an ordinary landlord, if he take a counterpart signed by the tenant, that shews that the tenant is bound. Here the Crown makes a condition that



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the tenant shall enrol the lease, or it shall be void. The enrolment, therefore, is the counterpart, being the acknowledgment of the tenant himself upon the record, that he takes by virtue of a grant from the Crown. [*Littledale, J.* You do not get that clause otherwise than by means of the enrolment, from which you assume that it is so in the lease.] It is so universally. [Lord *Tenterden, C. J.*—According to the case of *Kinnersley v. Orpe*, I should conceive that to be a general principle.] The fact as to which Mr. *G. Harrison* has been interrogated by the Court, is a sufficient foundation for our argument. The tenant comes and enrolls the lease, and pays a fee for the enrolment. That act amounts to an agreement or acknowledgment by the tenant that this document is the lease under which he holds; a solemn acknowledgment that the enrolment is a copy of that lease, equally binding with a counterpart signed by the tenant. If a counterpart were produced signed by the tenant, as an acknowledgment that he takes under the lease, that would be sufficient. I apprehend that by the course of office the property of the Duke of Cornwall could not be alienated even for life, except by record.

*Harrison, ad idem.* In a great case, which was argued some time ago in the House of Lords, a suit between the Duke of Cornwall and Sir John St. Aubyn (a), the opinion of the Judges was taken whether the Duke of Cornwall had a right to proceed *ex officio* by his attorney-general. The Judges gave their opinion that he could; and one of the grounds stated was, that while the property was in the hands of the Duke of Cornwall, it was entitled to the same protection, and was held in effect under the same provisions as while in the Crown.

*Dampier, ad idem.* Not long after the creation of the duchy there arose a question, whether the Duke, in right

(a) So held in the *Exchequer*. Wightw. 167.

of a manor, parcel of the duchy, should enjoy a royal prerogative, the wardship of an heir who held of another lord by priority, which a common grantee of the Crown could not have enjoyed (a). The question is said in the Year Book, 21 *Edw.* 3, fol. 41, (b) to have been adjourned. In Fitz Abr. Prerogative, pl. 16, (c) the point is said to have been decided in the Duke's favour, upon the ground that the manor was not disannexed from the Crown by the words of the charter, in which the limitation is "to the King's son and his heirs, *Kings of England*." It seems from the Prince's case (d), and other authorities, that the King and Prince had equal rights in regard to the duchy lands. This appears also from Sir John St. Aubyn's case (e), and the informations cited there. The duchy possessions are part of the lands of the Crown (f), which has at all times an interest in them, and the prerogative protects them, whether in the Prince or in the Crown. If then the office be an authentic office when there is no Duke of Cornwall, it seems absurd to hold, that on an event over which there is no human control, (the demise of the Crown or Prince,) it shall alternately become and cease to be an office of record.

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*Coleridge, ad idem.* This inrolment must be looked at in the light of a counterpart of a lease, which is not the less evidence against the tenant because it is inrolled. Here the inrolment is required to make the lease valid. The inrolment takes place on the application of the tenant, and a fee is paid by him on the inrolment. This is, therefore, the proper evidence for the lord to offer. An original lease

(a) Bro. Abr. Prerogative, pl. 22.


(b) *Prince of Wales v. Joan Bassett*, M. 21 *Ed.* 3, fo. 41, pl. 46. Brooke merely states that Mowbray, (who was the defendant's counsel,) denied that the prerogative extended to the Prince.

(c) Query, whether this decision was any thing more than the argument of the Duke's counsel.

(d) 8 Co. Rep. 29 a. b. See *vide* Appendix, G.

(e) Wightwick, 167, 73, 74, 75.

(f) *Ibid.* 111, 189.

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may be manufactured by a man in his own closet, but if you have the counterpart, or, what is tantamount to it, the inrolment, that appears, on principles of reason, to be the best evidence for the lord.

*Brougham*, in reply. It has been argued that this is to be taken as a counterpart; but the question is, whether this inrolment is tantamount to a counterpart, no proof having been given that the counterpart is lost. Then it is said that the duchy is in this peculiar situation, that the Crown must be taken at all times to have the fee, or at least the reversion, and that it signifies not whether it is the one or the other. This argument would go to this extent, that whenever the Crown has the reversion, during the time that the estate is out of the Crown, in the hands, for instance, of a tenant in tail, every thing done respecting the estate in the mean time is to be taken as matter of record (*a*); all the leases granted by the persons having the particular estate are to be taken as matter of record, and whatever they do in their private offices is to have the same credit as if these were public offices, because the reversion is in the Crown. The fee is not in the Crown. It is one of the resolutions in the Prince's case, that the fee-simple of the duchy is in the Duke. It is no doubt such a fee-simple as must determine upon the event of there being no Duke of Cornwall, and upon the determination of that estate the fee-simple is in the Crown; and it is not disputed that the property must be taken as Crown property; but the question is, whether, while there is a Duke of Cornwall, and while, therefore, the fee is out of the Crown, there is, during that period, any thing peculiar to distinguish this from any other manor, for example, that of the Bishop of Durham. It cannot be put higher than the case of a County Palatine with *jura regalia*, which it is not pretended the Duke of Cornwall has (*b*). There it was held to be receivable only as secondary evidence. On the authority of

(*a*) *Post*, 225, 226.


(*b*) As to *jura regalia*, *vide tamen post*.

the case in *Douglas* (a), Sir J. Scarlett contends that the instrument itself, with the memorandum of the auditor, would be sufficient proof of inrolment. But that is not the point. In that case the original lease was produced. It was found there was a condition requiring the inrolment of that of which the original was before the Court; and the signature "Peregrine Fury, auditor," was held to be sufficient proof that the lease was inrolled; the question being whether that condition had been complied with, and whether that was the proper evidence of complying with the condition of inrolment; and it appearing upon the face of the instrument that a person then described as auditor had marked it as having been inrolled, that was held to prove the inrolment. This is the case of an original not being produced, and the question is, whether the inrolment can be given as evidence of that which is not produced. In the case referred to, the lease would not have been good without inrolment. If it could be shewn that the duchy leases required inrolment, and that this, which purports to be an inrolment, comes from the proper officer, that would be evidence of inrolment, and would let in evidence of the contents of the lease; but here the inrolment is merely a form for the benefit of the lessor, in keeping a memorandum of his estate. Without proof that the original is lost, or that search has been made for it, the inrolment is no evidence of the contents of the lease.

Lord TENTERDEN, C. J.—I am of opinion that this inrolment ought to be received in evidence. The estate of the Duchy of Cornwall is one of a very peculiar nature; there is nothing like it existing in the country. It is an estate vested in the Duke of Cornwall, when there is a Duke of Cornwall, and when there is no Duke of Cornwall it is vested in the Crown. Whether there be or be not a Duke of Cornwall, there is an officer called the auditor of the duchy (b), who is one of the officers appointed to manage

(a) *Kimmersley v. Orpe*, ante, 218, 220.

(b) *Ante*, 171.

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that property, whether in the hands of the Duke of Cornwall or of the Crown. To say that one rule shall prevail as to the formation of documents, or the evidence of these documents, when the duchy is in the hands of the Duke, and another when the duchy is in the hands of the King, would be accompanied with great confusion and great injustice. If we look at this instrument, which we must look at to see whether it can be received or not, it appears that one of the clauses in it requires that it shall be inrolled, and provides that, unless it be inrolled, it shall be void. If this were a lease granted by the Duke of Cornwall, that inrolment would be evidence against the Crown. I do not apprehend that any lawyer could entertain the slightest doubt that, considering the very peculiar nature of the Duchy of Cornwall, whether the duchy be vested in the Crown or in the Duke, the Crown has a peculiar interest in it at all times, and that whatever is done at any period is to be received in the same manner. I am of opinion, that whatever is done during the existence of a Duke, is to be treated in the same manner as if it were done by the Crown.

BAYLEY, J.—I can make no distinction between a lease by the Crown and a lease by the Duke of Cornwall in this respect. I think, to use a phrase which is used by Lord *Hobart*, as applicable to the condition of the Duke of Cornwall and the King, that the Prince "*Censetur una persona cum Rege.*" Now the Crown cannot alien but by matter of record; and unless it appear by matter of record that there is an alienation, the Crown will not be bound, as it seems to me, in the case of the Duchy of Cornwall, in which, according to Lord *Coke*, the fee shifts so as to be at one period of time in the King and at the other period of time in the Duke. Unless you have a regular series of all the documents by which the one or the other were to be bound, and that were upon record, you would be binding the Crown without due regard to that which is matter of record, and therefore, *interest corona* that there should

be upon record every thing executed by the Duke which is to bind the Crown, when the property shall pass from the Duke into the hands of the Crown; and *interest tenenti* that that lease shall be regularly and duly inrolled; because, if that be not the case, then the tenant will have no power of insisting upon his rights when the duchy comes into the hands of the Crown. It is the duty of the officer to take care that no document be inrolled which is not a due and a valid document; and we are bound to suppose, that in the discharge of his duty he acts within the limits of his authority, and takes care that no document be inrolled which is not authentic and duly executed. For these reasons I am of opinion, that inolments of leases and documents relating to the possessions of the Duke of Cornwall, in the auditor's office, are admissible in evidence.

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LITTLEDALE, J.—I am entirely of the same opinion. It appears to me, that for a lease of this kind the Crown and the Duke of Cornwall may be considered as identified. By the terms of the charter of *Edw. 3*, the property is settled on the first born son of the King; and when there is no first born son of the King, the property vests in the Crown; and I think it would be productive of the greatest possible inconvenience if the Court were to say that the inolment would be evidence if the estate were in the Crown, but not so if it were in the Duke. It is a shifting and changing possession from the Crown to the Duke of Cornwall, and back again. There are regular officers appointed to transact the business of the duchy, and whether the interest be in the Crown or in the Duke of Cornwall, it appears that those officers are the same. This has been compared to the case of the Crown's granting an estate tail, in which case the reversion is in the Crown; and it is said that on the same principle it might be contended, that if a lease were granted by the tenant in tail, such lease might be brought to be inrolled, and the Crown would have it in its power to make use of it in evidence. But it does not

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appear to me that this consequence would follow. Tenants in tail have a full and entire dominion till the estate tail is exhausted. The law does not contemplate that it will be exhausted in that way; but the law does contemplate that the estate of the Duke of Cornwall, as Duke of Cornwall, will be exhausted; for in the common course of things it must necessarily happen, that from time to time when a King of England comes to the throne, he will not at that moment have an eldest son to take the duchy. It appears to me, therefore, that considering the shifting and changing of the possession from the Crown to the Duke, and from the Duke to the Crown, the same rules by which leases from the Crown are authenticated must prevail in the case of leases granted by the Duke of Cornwall.

PARKE, J.—I am entirely of the same opinion, on the ground of the identity of interest which exists in this case between the King and the Duke of Cornwall. Upon that ground I think this good evidence, both when the duchy is in the possession of a Duke of Cornwall and when it reverts to the Crown. There can be no doubt this lease would be good during its continuance on the demise of the Duke of Cornwall. For the reasons stated by my lord and my learned brothers, it appears to me that there is an identity of interest, and therefore that this inrolment, which would be evidence for the Crown if the Crown were solely concerned, is evidence for the Crown and the Duke, being jointly concerned in the Duchy of Cornwall.

The inrolments of many leases of minerals within the duchy other than tin and royal mines were then read. As the special provisions in some were thought to bear on the question in dispute, as well as on the right of the Duke to enter on the conventional tenements and work the mines therein, these documents are here set out at greater length than the leases which related to tin.

An inrolment of a lease, July 3, 1742, from Frederick

Prince of Wales to William Lemon, for 23½ years, from March 3, 1748. Fine, 1063*l.* 7*s.* 2*d.* In this was a covenant by the lessee, that if he could not settle and agree with any of the tenants or occupiers as to the satisfaction for damage in entering, the same might be adjusted, settled and determined by the council or commissioners of revenue of his said royal highness, before the lessee, &c., should enter to dig, search, and work for any mines, minerals, or metals, and that the lessee should not enter until such disputes and differences were ended; and that in case any suit should be commenced for or against the lessee, &c., concerning the liberty or power of entering to dig, &c., in which the lessee, &c., should prevail, then the lessee, &c., should not compound with the owner or occupier of, &c., without the licence or consent of the council or commissioners of revenue of his said royal highness, his heirs and successors.

13th June, 1763. Inrolment of a lease from Geo. 3, to Hussey, Vivian, Richards, and Daniell, reciting the former lease, the death of Lemon, and that the property had become vested in those persons as trustees, contained the following statement, "that in consideration of 600*l.* paid to the receiver-general of the duchy, (as by receipt or acquittance under the hand and seal of, &c. bearing date, &c. upon the particular of the demise remaining of record in the custody of the clerk of the pipe of our said Court of Exchequer, may and will fully appear,) which fine of 600*l.* is to remain in the hands of our said receiver till the suit now depending in our Court of Exchequer touching our right to the said mines and minerals be determined; at which time the said fine is either to be answered to our use, or returned to the said Hussey, Vivian, Richards, and Daniell, as the lords commissioners of our treasury shall then think fit to order and determine, &c."

To explain the allusion to a suit in the above lease of 1763, office copies of the proceedings in the Exchequer upon an information by the attorney-general, and a bill by the executors of Lemon, were produced, being an information for the

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Crown, and a private bill for the plaintiffs, claiming the lease as executors. In that suit, the attorney-general was informant, Hussey, Vivian, Richards, and Daniell, executors and devisees of William Lemon, Esq. deceased, and Mudge and several other persons were plaintiffs, and Donnithorne and several others were defendants. The information was filed. There was an affidavit to support the matter stated in the information. The defendants appeared, and after their appearance a motion was made by Yorke, attorney-general, on behalf of his Majesty, upon which an order was pronounced, 10 July, 1762 (a). After which it does not appear that any further proceedings were taken in the suit.

*Wetherell, A. G.* This order is an injunction till answer. That is the effect of it.

*Brougham.* The suit relates to the manor of Tywarnhaile.

*Wetherell, A. G.* It will appear by the Assession Rolls that this was a customary tenement.

LORD TENTERDEN, C. J.—This is all beside the great question in this cause (b).

The next inrolment was of a lease to Thomas Daniell, 2 February, 1788, at a fine of 1440*l.*

Inrolments of three several leases, of 17 January, 1810, were then put in; the first being of a lease to Williams and others, of the mines, minerals, &c., in Tewington; the second, of a lease to Charles Carpenter, of mines and minerals in Tywarnhaile, fine, 3081*l.*, rent 2*l.* 10*s.*; the last, of a lease to Rashleigh and others, of mines and minerals in Restormel, Penkneth, and Penlyue, except tin and royal mines, fine, 841*l.*, rent, 2*l.* 18*s.* 8*d.*

Also an inrolment of a lease dated 3 August, 1809, to Fox and others, of mines and minerals in Calstock, fine, 5967*l.*, rent, 5*l.* 12*s.*

(a) See this order, Appendix, H. (b) *Vide tamen post*, seventh day.

Indenture, 31st March, 1813, being a declaration of trust, by the several lessees under the four last mentioned leases, by which the beneficial interest in the minerals in Tewington was declared to be in Charles Rashleigh and Charles Carpenter.

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1st May, 1820. Lease from Rashleigh and Carpenter of the mine in dispute, to Gill, under whom the defendant claimed.

The defendant then produced letters from the testator to Rashleigh, of 11th January and 6th February, 1812, respecting another copper mine in the manor of Tewington, which the testator said was "in duchy," referring to the assession books for his authority, and adding that as such mine was "in duchy," it belonged to Mr. Rashleigh.

*Stephen Pearce*, toller for the Lemon family, was then called to prove the receipt by himself and his father, who was also a toller; of the toll or dues of copper and other minerals from adventurers who had taken sets from the Lemons, when lessees of the duchy. He stated that the limits of those sets were within conventional or waste lands of the assessionable manors; that the discovery of copper in Tewington was recent; that he never took toll for minerals won under free land; that he believed that he had taken toll for all minerals which had been raised from under duchy land, and that he knew of no minerals so raised which had not paid toll to him.

*Brougham*. The inquiry ought to be confined to Tewington.

*Sir James Scarlett*. I am going to offer the receipt of tolls to a vast amount in different manors.

**LORD TENTERDEN, C. J.**—You might ask whether he has in other manors except Tewington, that raises the question. [The question having been put in that form,]

Upon a question as to the right to minerals between the lord of the manor and his tenants, holding by a peculiar customary tenure pervading a district which embraces several manors

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held for many centuries by the same lord *in capite*, and during that time governed and administered by persons acting under one commission, issued by the lord at stated intervals, and extending to the whole district, acts of ownership exercised over the minerals in a customary tenement in another manor within the district, are admissible in evidence, although within time of legal memory, the manors may have been held by different lords, and under a subject.

*Brougham*. That question I object to. Having already urged the objection, I merely refer to the cases there cited. But a difference has taken place since that objection was made. It appears by the cases that two grounds must concur, namely, that the different manors have with the manor in question been originally part of one district, earldom, duchy, or manor; next, that the identity of the tenure of all those manors must be made out. As the latter appears sufficient to dispose of this point, I call the attention of the Court to the evidence as to that. Of those manors, Tewington alone, with the exception of Helston and Calstock, is of ancient demesne, as is proved by the extract from Domesday Book. The tenure in ancient demesne is well known in the law, and the tenants in ancient demesne, of whatever kind (a), hold their lands differently, have different

(a) "Tenant in ancient demesne" is the modern elliptical expression, used to designate the customary tenant holding of a manor, which is ancient demesne. The term, if not defined by usage, would not present a very distinct view of this peculiar tenure; as tenants *within* the manor, copyholders and landholders, and even the lord himself, are literally tenants in ancient demesne. The old designation of "Socage in ancient tenure" appears to be less liable to be misunderstood. In these customary tenures, the freehold is not in the lord, as is the case with those customary tenements which are within and parcel of the manor (*Mann. Exch. Prac.* 2d edit. 359), but in the tenant. It is not, however, all freehold land holden of a manor of ancient demesne that is holden by this peculiar tenure. Land in frank fee may be holden of a manor in ancient demesne, either by knight's service (before 12 *Car.* 2, cap. 24) F.

N.B. 13 B., or by common socage T. 11, *H.* 4, fo. 86, pl. 30v But it does not seem to be necessary that the manor should have any tenants besides the customary tenants, in order to constitute it a legal manor within the rule which requires a sufficient number of freeholders to form a court baron. This is a point in which the Cornish conventional estates appear to differ from freeholds in ancient demesne; for we find (*ante*, 153) that though in Talskedy there were two conventional tenants, the duke's estate there is not spoken of as a manor.

In the Old Tenures (125, 126), it is said, "To hold in socage, is to hold of any lord lands or tenements, rendering unto him a certain rent by the year, for all manner of services. And note, that socage may be said to be of three kinds, viz. socage in frank tenure, socage in ancient tenure, and socage of base tenure. Socage in frank tenure is to hold freely by a certain

privileges, and are in other respects different from the tenants in other manors. Even villeins in ancient demesne had privileges of a peculiar kind, and held differently from the villeins in other manors. They, as well as all other tenants in those manors, were excused from various services, and were not called upon either to serve on juries, or to contribute to the expense of the knights of the shire, or to pay toll. F. N. B. 228. The tenure in ancient demesne was therefore peculiar, differing from that in other manors. Tewington, as well as Helston and Calstock, being ancient demesne, the tenure must have been different from that which existed in the other duchy manors. In all the documents produced, the tenants pay fine of tin, and at the end of the list of free tenants the amount of the particular sums which they pay by way of fine of tin is summed up. Then comes a list of the free conventionaries, who are stated in the caption of seisin to render fine of tin, without saying how much each renders. [Lord Tenterden, C. J. The word applied to the free conventionaries is "*vauet*;" not that they "render" so much, but that the toll of tin "is worth" so much. In the case of free tenants a certain sum is rendered, and in the others the amount is subject to variation.] In the *inquisitio post mortem Edmundi*(a), forty-three conventionaries render by the year at &c. for certain works and fines of tin 13*l.* 11*s.* 2*d.* [Lord Tenterden, C. J. *Pro certo redditu, operibus, et fine stanni.*] [Sir J. Scarlett. That rent for all manner of services, as before is said. *Socage in ancient tenure* is to hold in ancient demesne, where no writ runs except the little writ of right close, which is called *secundum consuetudinem manerii*. Socage of base tenure is where persons hold who are not wont to have other writ (*que ne soillent auter brief avoir*) than the *monstraverunt* to discharge themselves, when their lord distrains on them to do other services than they ought to do. And this writ

ought to be brought against their lord. And these tenants do not hold by any certain services, and, therefore, they are not free tenants."

The same description of the three classes of socage tenants is found in the *Old Natura Brevium*, title "Garde;" but it also appears there, that the socage in base tenure is in ancient demesne as well as the socage in ancient tenure. And see Mann. Exch. Pract. 361 (b) (d) *Ibid.* 363 (n).

(a) *Ante*, 141, 2 ; Appendix, C.

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is for certain rent, *and for* works, and for fine of tin. The word "certain" does not govern the other two (a).] In no other manor is there any thing of fines of tin whatsoever. This, therefore, is peculiar to Tewington. A third difference between Tewington and the other manors, is, that in Tewington the holding of the tenants is stated in the parliamentary survey to be "to them and their heirs and assigns for ever." This has been proved by the defendant to be the tenure in Tewington, but the evidence produced from the assession rolls shews in the other manors different classes of tenants, and a different species of tenure. They, it is said, hold from seven years to seven years, whereas in Tewington they hold to them, their heirs and assigns for ever, according to the custom of the manor. To prove the tenure, the defendant ought to produce the Court rolls of the other manors, and to shew from them, compared with the Court rolls of the manor of Tewington, that the tenure is the same in all the manors. Mr. G. Harrison has proved that such Court rolls exist, and that extracts from them come up to the duchy office. It lies upon the defendant, who contends for the admissibility of evidence from the other manors, to shew that the tenure is the same. Instead of bringing this case within the principle of the *Duke of Somerset v. France*, by proving that these manors were parcel of the same earldom, they have shewn that different manors came by different titles, and that even at remote periods there were great variances in the tenure.

*Erskine, ad idem.* This evidence can be admissible only in three ways, as proof either of the tenure itself, or of some incident belonging to the tenure, or of the custom of the manor. What takes place in another manor cannot be evidence of the tenure within that concerning which the question arises, unless that tenure be shewn to be under a

(a) It is, however, very common in law latin, for a pronoun or adjective which applies to several substantives, to agree in number and gender with the first substantive alone.

custom applicable to the several manors. The only foundation which could be laid for such a proposition would be to shew that before the time of memory, when the custom must have originated, those manors were under one lord, from which circumstance the defendant might have urged as evidence of conjecture, if not of presumption, that these manors, held together before time of memory, might have been held under the same tenure, and therefore the custom of one might go to prove the custom of the others. Three (*a*) manors of the duchy are proved to be ancient demesne, one (*b*) to have been out of the Crown before and since time of memory (*c*). No general customary holding, therefore, could have been given to Tewington and the other manors, for the latter were not in the same possession or under the same lord until long after time of memory. But if the defendant could shew an immemorial identity of possession, the practice in one manor is not evidence of the tenure in other manors, and if not evidence of the tenure it cannot as yet be received as evidence of an incident to tenure. It must first be shewn that the tenure in all the manors is the same; that, according to all the cases, is the foundation. In the *Duke of Somerset v. France, Fortescue, J.*, the only judge who thought the evidence receivable on principle, states, "that it was proper to inquire whether all the manors were anciently of the same tenure." Here the defendant has not made out enough to found any argument on the proposition of *Fortescue, J.* Tewington is ancient demesne. The tenants in ancient demesne stood on a very different footing from others. In manors of ancient demesne there were copyhold tenants, but there were others who held to them and their heirs, not at the will of the lord, but having a freehold interest. Now a tenant who has a freehold interest must have very different rights from those of mere copyholders; and, therefore, unless the other manors were

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(*a*) Climsland, Helston and Penlyn, besides Tewington.

(*b*) Trematon, *ante* 140, 141.

(*c*) Lostwithiel appears to have been in the hands of a subject since legal memory, *ante*, 141, (*a*).

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also ancient demesne, possessing such privileged tenants, the defendant fails in making out that identity of property or of tenancy, which would authorize him to give that which takes place in one manor as evidence of what ought to take place in another. According to the parliamentary survey the defendant has shewn that the tenants in Tewington hold to them, their heirs and assigns for ever. [Lord Tenterden, C. J. 'That they claim so to do. Bayley, J. They return it as a custom that they hold from seven years to seven years, and that there ought to be every seven years an assession court, to which the tenants may repair to enter their claims and new-take; not that the tenancy then expires, because they hold to them and their heirs.]

Such parts of the parliamentary survey as related to the other manors were then read. As these are mentioned and commented upon in the arguments which follow, they are not here set out.

*Erskine*, (in continuation.) Upon the documents read, there is enough to shew that a conformity of tenancy does not exist in all the manors from which they seek to extract evidence applicable to that of Tewington, so as to let in evidence of the custom of the other manors. It is true, that it appears by all the entries there was to be held an assession court, at which the tenants were to appear, and at which courts they were to retake their tenements "though their estates did not then determine;" but the question before the Court is, what the estates were that did not so determine. In certain copyhold estates, held at the will of the lord, the estates do not determine upon the death of the tenant, but the heir takes the estate upon the death of the ancestor; and though he is admitted, yet still he has a right to that admission, and his estate continues as against every body else. He has a right to be admitted upon the death of the ancestor; and the mere statement in some of these entries, that upon the death of the customary tenant the estate descends to his heir, does not make up for the

want of those words that belong to the statement in the manor of Tewington. Now the statement as to Tewington is, that the tenants held an estate of inheritance to them and their heirs from seven years to seven years, according to the custom of the manor. As to many of the other manors it is stated that the tenants held without any original grant of an estate of inheritance, that they are to come to the assession court to take up their inheritance, and that after the death of the tenant the estate goes to the wife, and then to the heir. Where it is not said that the tenant holds to himself and his heirs and assigns for ever, it does not appear that they do not hold at the will of the lord. Now the great distinction made in all the books upon which the case must turn is, that the nature of the estate which each tenant takes depends upon the character of the original grant to him, whether it was to hold at the will of the lord or to hold to him and his heirs and assigns for ever, inasmuch as it is stated that those who take to hold to them and their heirs and assigns for ever, though they hold by copy of court roll, take a freehold interest, whereas those who take to hold at the will of the lord do not take such freehold interest. Unless, therefore, it appeared that all took to hold to them and their heirs and assigns for ever, sufficient identity of tenure is not made out to let in the custom from other manors. There are other differences as to the nature of the tenure. In some of the cases, the estate is said upon the death of the tenant to descend to the widow, in some for life, in some during her widowhood; in some, it is stated that the estate descends to the heir of the tenant upon the death of the wife, according to the law of England. In Climsland, it is stated to descend to the heirs of the wife, and not to the heirs of the tenant; and in others, it descends, not in coparcenary, but to the eldest daughter; all shewing a different sort of estate from that proved in Tewington. There it is to the tenant, his heirs and assigns for ever; the widow taking for her life, and the estate descending to the heir of the tenant

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upon the widow's death. In some, it is stated, they may lease for six years; in some, that they may lease, without stating any precise period. These differences appear to shew that although there has been introduced a common practice of holding assession courts, and the tenants are bound there to attend, yet that the original estates granted out by the lord to those tenants, whenever they were first granted, were not of the same nature, for they have not the same incidents in many instances; and it cannot be said that because the customs agree in part, that all the incidents must be the same. The rule upon which Mr. Justice *Fortescue* proceeded was this, that if you shew the tenure to be the same, and the same in all the incidents except the one about which you are inquiring, and you find that the facts connected with that incident have not occurred in the particular manor about which you are inquiring, you may then refer to other manors in which certain facts so connected have occurred. This proceeds upon the supposition that the other incidents of the tenure agree; here the incidents do not agree. But it has been said that the parliamentary survey is a modern document, that you must look to the other documents in the case to ascertain the tenure of these estates; and looking to those documents, the defendant's counsel say they have made out that they are mere leasehold estates. If they rest upon the assession roll, what right have they to refer to any other manor for any other custom; because the assession roll would make it out a mere leasehold estate, at the option of the lord to let it to another tenant at the end of seven years. If it be a mere leasehold estate, according to that document, to hold for seven years, what right can they have to refer it to custom. Where an estate is held by custom, you may go on to prove what the custom is, but if it be held by compact and convention, the agreement will determine for itself what are the incidents belonging to it. As regards the assession roll, the defendant's counsel have made out no title for the admission of this evidence, and if they stand

upon the parliamentary survey, they have shewn no identity of tenure. By the custom there is a fine of tin payable by the conventional tenant; in the assession roll the amount is not mentioned, but in two accounts the amount of what the fine of tin was worth appears to be the same; therefore, it should seem, that although the amount is not specified, yet that it was a payment in certain, which did not vary, because in the reign of *Edward the First*, as in the reign of *Edward the Third*, it is stated to be worth 20s. In the *Inquisitio post mortem* (a), it is stated that for a certain rent, works, and stan-nary fines, they render 13*l.* 11*s.* 2*d.* Now unless the pay-ment for the fine of tin was certain, the sum would not have been so stated. The tenants render such sums as make up that amount; if it was an uncertain sum, the amount could not have been so stated, but only as an average. There-fore, it clearly appears that the conventional tenants in the manor of Tewington had to pay an accustomed rent and fine of tin certain. In none of the other manors do the conventional tenants pay any such accustomed rent, which shews they held by a different tenure and different rule than that by which the tenants in the other manor held. To shew that the tenure was precisely the same, what would be the proper evidence? It is stated in the documents read, that these estates, in many cases, have passed by surrender. It does not appear that at any of the assessions there is any surrender or admittance, whereas where there are admissions in the manor court it is an universal rule, that there is a copy of the court roll given out to the tenant, and his title deed is that of which he has a copy delivered to him. If in this case he has something delivered to him stating that he holds to him and his heirs, the defendant should prove that the other tenants have their documents granted them in the same way, so as to shew their tenure to be the same in the land, before any inference can be raised as to the identity of the custom and incidents belonging to it.

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(a) *Ante*, 141, 231; *post*, Appendix, C.

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*Patteson, ad idem.* The ground of objection is, that there is a peculiar district, in which there are a number of manors having some peculiar tenures applicable to them all; that I take to be by custom, because it cannot be that there should be any peculiar tenure of this sort, unless it is by custom, applicable to all the districts of the manor. It cannot be said, if the holding of a tenant be in any particular manor by express agreement with the lord, and in another manor by express agreement with the lord, the one can be brought in evidence as to the other. If it be by agreement, it is not matter that can be applicable to the whole. Now, as far as the assession rolls go, from the very evidence the defendant has given, and what he relies on, it should seem he treats it as a matter of agreement between the lord and the tenant, because the very terms of the first assession roll are, that the lord might, if he pleased, enter and take all the land at the end of seven years; and the defendant's counsel have attempted to shew, and have shewn, in one or two instances, entries in which one man had bid against the other and taken the land at the end of seven years at a higher rent. That is expressly and unquestionably matter of agreement. How and by what means the estates of inheritance, which it is admitted the tenants now enjoy, have arisen, it is not for me to say; but at all events, it should seem doubtful whether these estates of inheritance existed together with the seven years holding before the time of the first assession roll; the first assession roll of itself does not shew anything about the inheritance. The counsel for the defendant ought, in order to let in the evidence from the other manors, to shew a customary holding peculiar to all. That customary holding must be from time immemorial; and it is in evidence that at the time of legal memory the manors were in different hands, though at the time of Domesday, and just after the time of memory, they were in the same hands. The assession rolls do not shew this; quite the contrary; from them it appears that the tenants came and took by agreement with the lord, that one tenant

outbad another, that the rent has been increased and then decreased, that in some instances fines were taken on conventional tenements, of which you heard nothing before; it appears also, that the tenant, in some instances, particularly covenanted to reside or keep house; those are instances of express and particular agreements between the parties. Hence I apprehend that such evidence shews that evidence of a general custom cannot in this case be admitted. There seems to be some confusion in the evidence with respect to the fines of tin and toll tin; but they are totally different things. Toll tin is the share that belongs to the lord upon its being raised. The fine of tin is peculiar to the manor of Tewington, and is in the nature of rent; it is indeed called a rent; and the free tenants pay each of them a particular sum, in addition to their rent, in money. What sum, for fine of tin, each conventional pays is not specified, it is one gross sum, and there is no variation; and although it runs *valet per annum* 20s. yet in all the other documents no sum is returned except 20s. In the case of the free tenants it is 13s. in some places, and in others 14s.; but there is no variation in the sum of 20s. from the beginning to the end for fine of tin for this manor. There is, therefore, a great peculiarity in this manor as to this tin fine, and whether it is a distinct sum that each tenant was to pay, or whether the 20s. paid by all the conventionaries was assessed amongst them at each particular year, does not appear to be material, because, at all events, it is a tin fine paid by all the conventionaries. It must mean something that must give them some privileges and some rights that the tenants of the other manors, who paid no tin fines, had not. The native conventionaries pay no such fines, because although in the caption of seisin and extent it is said 20s. for a tin fine from the free and native conventionaries, that is a manifest mistake in those documents, because you will find that a free conventional is said to pay a fine of tin upon each man's holding, and in the native conventionaries there is no such mention, and it means some privilege clearly applicable to

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taking the under-ground property. Free tenants pay the same, and it is by such payment that they have the right to take the tin in this manor, whatever right they may have in any other. This is a broad mark of distinction between this and the other manors, sufficient to shut out the evidence from the other manors. There was some little doubt made yesterday, when this matter came before the Court, whether or no this manor was ancient demesne. It was said, it would be found in Domesday that Tewington was not in the hands of *Edward* the Confessor, but in the hands of the *Earl Harold*, in the time of *Edward* the Confessor. The best description given any where of what is land in ancient demesne, in which it is said "these manors are called the ancient demesnes of the Crown, which were in the hands of *Edward* the Confessor, or *William* the Conqueror, and so expressed in the Book of Domesday, made or begun in the 14th year of *William* the Conqueror." So whenever a question arises as to the particular lands being ancient demesne, it is to be decided by the production of Domesday Book, wherein the lands which were in the possession of King *Edward* are called *Terra Regis Edwardi*, and those which were in the possession of *William* the Conqueror are called *Terra Regis (a)*. What is described in Domesday as *terra regis* is demesne. Tewington is put in capitals as all the other manors are. Therefore, upon these several grounds, namely, that Tewington was ancient demesne, the tin fine, the great uncertainty as to the holding in other manors from the parliamentary survey, and the doubt whether at the time of the assession roll there was any estate of inheritance at all, it is submitted this evidence is not admissible.

*Follett, ad idem.* I understand that it is proposed not to go into any evidence to shew the peculiar tenure, but to shew by the custom of other manors what is the custom in this manor. To entitle them to do that, in addition to

(a) And see Scriven on Copyholds.

shewing that the tenure is the same, they must shew that the manors from which they propose to obtain evidence were, together with that in dispute, in the hands of the same lord before legal memory. Shewing the tenure to be the same, amounts to nothing at all, because they are almost always the same. The copyhold tenants hold by the same tenure, and yet I do not apprehend, if there is a question concerning the custom of one manor, that you may shew what are the customs of other manors; because, although the tenure is the same in all manors, the custom is not always the same. To make it a legal custom, it must be something existing before the time of legal memory, and must be supposed to exist between the lord and the tenants of the manor; and, therefore, to shew the custom of one manor to be evidence of the custom of another, it must be shewn that the manors were in the same hands; so that it is probable the same grants and privileges obtained by the tenants of one manor were granted to those of the other. It is not enough to shew that the tenure of each is similar and peculiar. In some of the assessional manors the descent is to the wife to take beneficially. Suppose a dispute should arise as to the right to take mines in one of the manors, would it be allowed that, because the right of descent to the wife, and her tenure was the same in such manors, the parties might adduce evidence as to the mines from the other manors? If that be not so, I would suggest it is upon that very point on which Mr. Justice *Fortescue*, who was the only judge that agreed to the principle of the decision in the *Duke of Somerset v. France*, rests his judgment; because, from Mr. Justice *Fortescue*'s report, it appears that the particular reason he gave was, that these manors and counties anciently made one earldom, and consequently belonged to one earl (a). [*Little-dale, J.* That is not according to the history of the times.] [*Sir J. Scarlett.* There was no Earl of Northumberland.] I do not know that it makes any difference whether it is true in history or not; but it is the ground that *For-*

(a) *Vide ante*, 144, 145, 148.

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*tescue*, J. gives for that decision; he says there was an Earl of Northumberland before the Conquest. [*Littledale*, J. There was no Earl of Northumberland.] I submit that if the manors are not in the same hands, no custom which grows upon one manor can be evidence in another. There can be no custom arising after legal memory; and therefore it is essentially necessary, besides proving the tenure, that they should shew that these assession courts, which are relied upon as forming the link of connection between the manors, were holden before legal memory whilst the manors belonged to one lord, who directed these assession courts to be held. If the defendant's counsel had done that they would have proved both their steps, and might have been entitled to produce this evidence.

*Wetherell*, A. G., in answer to the objection. The tenure in all the manors is substantially the same. It is a tenure by which they have a right to go to the court to renew the holding, which, with a little variation of language, is a holding where they are bound to renew from seven years to seven years; the holding is substantially the same; the holding is by right in the tenant to have his tenure renewed, with an obligation upon him to renew it. Identity of holding an estate, or whatever name is given to it, is an identity in terms and in substance perfectly made out, though there may be here and there some little variations of exception. These persons had the same right to have their tenures renewed as a man who has a covenant for a perpetual renewal in Ireland has a right to have it renewed (a). There can be no doubt, if the custom is that a man should go to the lord and have his estate renewed upon certain suits and services, he has just the same right now as a man whose tenure is expressed at the will of the lord, if that tenure be that he shall invariably renew: and although it be at the will of the lord, the law has given a right to the tenant to have it renewed; but the question

(a) *Vide post.*

is, to renew what? This similarity of tenure or holding of the estate, which was expressed in that document in 1337, is subject to the unsubstantial variances and expressions as the same tenure that holds now. This is consonant with that tenure expressed upon the roll and the parliamentary survey, and consonant with those apparent consequences that would appear to result out of that tenure, that their tenure was less than freehold. He also argued that the manors of the ancient duchy were a municipium, a corpus or community so united, that what was done in one was evidence of what might be done in the others.

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*Tindal, S.G. ad idem.* Upon the evidence already received it sufficiently appears that these 17 assessionable manors formed one continued uniform district, to allow evidence to be given upon any one part of it, to ascertain the rights between the lord and the tenant in any other part. As far back as the year 1230, that is, the 15th *Henry 3*, we shew that 15 of these manors formed the subject of one grant, and that in a very short period afterwards two others, Calstock and Trematon, which had been before in the Crown, came again into the Crown; so that the whole 17 were united in the Crown before the grant to the Duke of Cornwall. We have also shewn, that from that time down to the present, these 17 manors have been constantly united together, the force of that grant, like an act of parliament, having kept them inseparable. We have shewn from the earliest period the three descriptions of free tenants, conventional tenants, and natives of stock, until the latter class fell off. We have shewn from that early period down to the present time, that every seven years there has been a commission issued from the Duke, by which commissioners have been appointed to assess and new-rent the estates. We have shewn, further, that the distinction between free land and duchy land, or Prince's land, is known not in one of these manors only, but in all of them. And, lastly, we have shewn, that in the whole of the 17 manors the custom



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has been, that the toll of tin, where it is free land, has been divided between the bounder and the owner of the fee; and where it is duchy land or Prince's land, between the bounder and the Prince. These several facts form together such a body of evidence that this is one continued district, as will let in the evidence which the plaintiff ~~now~~ seeks to submit to the jury; that evidence being, that the rights of the lord as to the pernancy of the profits below the soil in one manor, shall be given in evidence, to shew his rights to the pernancy of the same profits in another. When we offer this evidence, we are met with an argument that it is not admissible, unless we can shew there has been one tenure in one person, and *that* from before the time of legal memory. I will endeavour to apply myself to both these points, to shew that they are not well founded in law. First, however, it is submitted whether we do not satisfy them; for in seeking to establish the existence of a custom beyond the time of legal memory, you are not bound to prove that the thing has existed from the time of *Richard I*; all you can shew is, that it was done so far back as living memory goes. Here there is no document to the contrary; the thing itself may have existed; and it is a most singular circumstance that we have been able to produce such a well-connected chain of evidence, reaching down to the present day, from so early a period as the year 1230, only 41 years subsequent to the very period to which they say we ought to extend it. What custom, or what right to tithe has ever been carried so near the limit? The ordinary principle of evidence, that you must carry your custom up to the commencement of legal memory, we have satisfied, because we have carried it so near, and because there is nothing to contradict the legitimate assumption, that *Henry III.* took what he gave from his father *John*; and if you assume this, you approach so closely to the boundary of the time of legal memory, that the whole case may be almost said to be proved upon their own ground. But the counsel for the plaintiff are not warranted in saying that we are bound to prove the tenure in one person

beyond the time of legal memory; I appeal to the case of the *Duke of Somerset v. France*. The plaintiff relies upon the reason given by *Fortescue, J.*, which is not adopted by the rest of the Court; and he says that the grounds upon which they admitted the evidence of the custom of one manor to give a fine to the lord was, that all those manors were originally held of one earl. There was no evidence before the Court of the period when they were so held; and I believe the supposition is the reverse of the truth, and that there was not any one earl who had them all (a): and I am sure the probability is much greater that such uniform tenure arose from the relative situation of those counties between England and Scotland. It was one common cause to create one common holding between the lords of adjoining manors, which is more likely than that they should have been in one lord. One might suppose, where incursions were so frequent and outrages most likely to be committed, and the frequent calling out their tenants imposing harder services, the lords might give those tenants descendible estates as a reward for such harder services; such cause would operate through all the border. The same cause, we know, must have existed; and looking back to those dark times, the situation of those counties seems to have occasioned this uniformity of tenure and of fine in each. This is a more probable account than the supposition made by the learned Judge (b) in giving his own report of his own judgment upon the case. But that case did not decide a point which had not then arisen, for the first time; it refers to a case decided in *Keble* (c), where the custom is let in to shew the rights of lord and tenant in another border manor, without any such reason being assigned; and therefore we are not bound by an authority that there must be one tenure in one lord before the time of legal memory. But why is it to be before legal memory? The plaintiff seems to think that the tenure must be before legal memory; on the contrary, that tenure may have been created as late as 18th

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*Vide ante*, 144, 5, 8.

(b) *Fortescue, J.*

(c) *Ante*, 146.

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*Edward I.* There is no reason why a great lord might not, up to that year, have created an uniformity of tenure, and much later than that time with respect to the property we are discussing, because the statute of *quia emptores* (a) did not bind the King; and it was not till the statute of *Edw. 2, de prerogativâ regis* (b), that the tenants *in capite* were prevented making those divisions; and therefore, down to the year 1324, long before which we shew this custom to have been uniform in these manors, there might have been the very tenure created by which the lord would claim the soil, the tenant the surface. But we are not inquiring into a collateral custom, it is part of the immediate convention or contract what the lord grants and what the tenants take; it is not a question whether a fine is to be paid upon the death of a tenant that arises, but what has been the agreement; and when it is clear that the lord has granted nothing but the surface to the tenant, and we find in the grant to the Duke of Cornwall, in 1338, and still more that in the grant to Richard of Bordeaux (c), that the King expressly passes all mines, upon what principle is it we are to be restrained from inquiring into what is parcel of that grant. Whether a thing is comprised or not comprised within the grant is matter of evidence. We find that the Crown granted all the mines to the Black Prince, and afterwards to Richard of Bordeaux, and we have a right to inquire whether, in the whole of these assessionable manors, the mines were taken from the Crown from the earliest period of time. Now I have assumed for a moment that the legal ground upon which such evidence is admitted is, that you must shew something of the manor, and tenure and custom; but I beg to observe, as far as the cases go, they do not warrant so narrow a construction, because all the cases, with the exception of the first, and that I have shewn to be reconcilable with the uniform situation of those border counties—all the cases that have followed have adopted a wider and more reasonable ground, they have all been grounded on the nature of the country; and where

(a) 18 *Edw. I.* c. 2. (b) 17 *Edw. II.* st. 1, c. 6. (c) *Ante*, 155.

there is a district so constituted by nature that you would reasonably suppose there would be a uniformity of custom and pernaney of profit, evidence like that we now contend for has been received. The best case is one from the Court of Chancery, before Lord *Hardwicke*, of the *Dean and Chapter of Ely v. Warren (a)*, where the question arose in lands within a level of the fens; and Lord *Hardwicke* there says, "when you find the manors are so situated that they have evidently the same relative rights, such evidence as this in dispute is admissible." The instance applies here; in mining districts you may give evidence of the custom of one manor as establishing the right in another. After that came the case of *Stanley v. White (b)*. I will not state that case, but if the right was proved to exist in one part of an intire thing, common sense, which governs the law of evidence as well as the other parts of our law, would say, where you have united the whole in one character, it would be right you should give evidence from one part that would bear upon the rest. In Lord Hale's Treatise upon Ports of the Sea, is a case in which the question was, what rights the tenants of lands that were adjoining the Severn had upon the river Severn; and it was agreed that evidence might be given in one manor of what was done in other manors all along the Severn, which served as the boundary of the manors *usque ad medium filum aquæ*. In that case there was no inquiry whether there ever had been one lord of all those adjoining manors, any more than there was in the case of *Stanley v. White*; whether there had originally been one owner of the parts surrounding and adjacent to it. The case was not put on the question of one original tenure beyond the time of legal memory, but upon that which was a legal ground: whether it was not reasonable that, where the territories had been so long united, light and certainty in the investigation as to one part would be afforded, by allowing corresponding evidence to be given as to another part. This has been followed in

(a) 2 Atk. 189.

(b) 14 East, 332.

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two or three subsequent cases of *The King v. Ellis* (a), in which it is said by Lord *Ellenborough* (b), "I have always thought that this case of Lord *Hale* threw light upon the nature of this evidence, and shewed that it is to be considered rather as evidence of a custom pervading one common district of manors." There is another case still later, *Tyrwhitt v. Wynne* (c), in which it was said, "when once it has been established that the *locus in quo* is part of one intire district, honor, or manors, it is competent to give in evidence acts done in other parts of the district." I contend that sufficient has appeared to connect together from the earliest times, indissolubly, those 17 manors, and to let in, upon a question of quantity of enjoyment between the lord and the tenant in one manor, what is done in another.

Sir *James Scarlett*. Mr. *Brougham* observes that he has shewn a distinction in the tenure of these manors which destroys the admissibility of the evidence now in question. He says the manor of Tewington is of ancient demesne. There is something in the generality of the phrase which leads to a misconception. If he means that the manor itself is of ancient demesne, that is one thing; but if he means that these particular lands are held in ancient demesne, that I deny. Lord *Coke* says, that lands so held are held of a manor which was in the hands of Edward the Confessor, or William the Conqueror. If these lands were held of a manor which was at the time of Domesday in the hands of the King, then the plaintiff would make out his proposition that these were held in ancient demesne. But the distinction seems to be this: lands mentioned in Domesday to be holden of manors in the hands of Edward the Confessor, or William the Conqueror, are ancient demesne. The manor must be in the King's hands, and the lands holden of that manor. But the manors and lands that were the freehold of the King in his demesne, are not held in ancient demesne. It was never contended that

(a) 1 M. &amp; S. 662.

(b) *Ibid.* 662.

(c) 2 B. &amp; A. 554.

copyhold lands were lands in ancient demesne, and of course leasehold lands are not. In *Brittle v. Dade* (a), the defendant in ejectment pleaded that the land was held of the manor of D., which is ancient demesne. The plaintiff replied, that true it was that the lands aforesaid were held of the Dean and Chapter of Worcester, as of the manor of, &c., which manor was ancient demesne, but that the lands were copyhold. The defendant rejoined, that the plaintiff having acknowledged the lands to be ancient demesne, it was no matter whether they were copyhold or frank-fee. The Court held, 1st, that the replication was repugnant, for lands held as of a manor must be frank-fee, for the copyhold lands are *parcel* of the manor, and cannot be held as of the manor, and therefore the replication, by saying they were held as of the manor, and that they were copyhold, was repugnant. 2dly, The rejoinder was naught; for if the land be copyhold, an ejectment lies: first, because copyholds are of so base a nature, that a writ of right will not lie; secondly, if such writ did lie, it would be inconvenient, because copyholds are parcel of the demesnes of the manor; so that, if they are triable in the lord's Court, the lord might be judge and party. This case shews that a copyhold is not held as of a manor; it is parcel of the manor. There is another case in the time of Lord Mansfield which illustrates the same principle (b). An application was made to the Court for leave to plead ancient demesne in bar to an ejectment. It was stated it must be with the leave of the Court, founded upon an affidavit. An objection was made to the sufficiency of the affidavit, because the affidavit only alleged that the lands in question were holden in ancient demesne, and that they were holden of the manor of Godmanchester, but does not go on to allege that the manor of Godmanchester is itself holden in ancient demesne. The Judges say there, that, considering that this is a plea not going to the merits, and that the claims

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(a) 1 Salk. 145, S. C. *per nom.* (b) *Doe d. Rust v. Roe*, 2 Burr.  
*Brittel v. Bade*, 1 Lord Raym. 43. 1046.

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of ancient demesne are not to be encouraged, the affidavit must state that the lands are held in ancient demesne. This establishes, that if these lands were in the hands of the King at the time, or if they were copyhold lands, they could not be lands in ancient demesne, whatever the manor might be. This appears to dispose of the objection made, that these lands were in ancient demesne. Now we come to the other question. Mr. *Erskine* says, that one part of our case makes it leasehold; and he says you cannot give in evidence usage under one leasehold to explain the rights under another. If Mr. *Erskine* will concede to us that the lands are leasehold, we shall not ask to let in this evidence, we shall be contented with the legal consequences of that concession. But my learned friend says the lands are copyhold, and, if copyhold, that it is not usual to introduce evidence relating to copyholds of one manor as applicable to those of another; but if he will admit the land is copyhold, we will not ask for any further evidence. But the truth is, there is something obscure, something uncertain in the nature of the tenure, which is a matter for the jury to try, and on which your lordships ought to have all the light we can obtain to explain it. It appears quite clear that at one period these lands were leasehold; whether they have grown by usage into copyhold, or whether an act of parliament, creating a right to a perpetual renewal, must be presumed, from an enjoyment for five hundred years, may be a question. But we are now considering the interest the tenant takes under this species of tenure, whatever it may be. Is it copyhold? if that be conceded, we have no occasion to trouble the Court any more; but it is admitted it is not of the ordinary description of copyhold. It may be a copyhold of a peculiar character, and that peculiarity will form exactly the ground taken in the case of the tenant-right estates, for admitting similar evidence. Those estates being united in some common peculiarity, it was held that proof of the rights in one was admissible in a question concerning the

rights of another. I venture to put this case as one of copyhold. It is supposed that copyholds originated in a long-continued usage, the lord allowing the tenant a right to his tenure, and to transmit the estate to his heirs in a certain order of succession, grafted upon that right. Hence arose corresponding obligations upon both lord and tenant, of which courts of justice take notice, from great respect to long usage. A copyhold, held at the will of the lord, is, from the very expression, an interest in the tenant derived from the lord less than the fee. The custom of the manor binds the lord to give the tenant an interest derived from the fee, but not in the soil. I should be glad to ask this question, why, if a copyhold interest could grow out of a tenancy *at will*, it might not grow out of a tenancy *for years*? In one description of copyhold, the most universal, it is a tenancy at will, and the tenant holds by copy of court roll, at the will of the lord, according to the custom of the manor. Is there any thing inconsistent in saying that a man who holds from seven years to seven years, by custom of the manor, had a better estate originally than a mere villein or copyholder, because he had it for the term of seven years; whereas the copyholder might have been turned out by the determination of the lord's will? It has been urged, that in this case it appears that the estate goes to the widow, and, on her death, to the husband's heir, and not to the executor: the same objections apply, when rightly considered, to ordinary copyhold. If a man is a tenant at the will of another, and dies before that will has been determined, his executor will take the tenancy till the landlord determines the holding (*a*); and in like manner, if a man dies in the

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(*a*) A *freeman*, tenant at will, holds *quandiu ambabus partibus placuerit*, and the tenancy determines upon the death of either tenant or lord; but the *villein* tenant at will held *ad voluntatem domini*, and as he could not determine the tenancy by his own act,

it would seem that his chattel interest in the land would upon his death vest in his executor, in the same manner as any other personal property which the lord through indulgence did not, or which by custom he could not seize.

It is almost unnecessary to add,



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course of holding as tenant for a term of years, his widow would not hold it but by administration; and yet what is a copyholder but a tenant at will; and therefore all the objections urged to the nature of this tenure, as going not to the executor or to the wife, but descending to the heir, might be urged against a copyhold tenure that is derived from a more minute interest. A chattel interest would not at law descend to the heir; but there is nothing inconsistent in presuming that such interest may be increased into this particular tenure, a copyhold tenure created by usage, and so sanctioned by time, that the lord is now bound to renew to the heir from seven years to seven years, and that the tenant may hold the estate as copyhold, although not at the will of the lord. If there may be such a tenure, and nothing is found in the law books from which its incidents may be collected, and it becomes necessary to seek for those incidents, would your lordships shut your eyes to the nature of the tenure? We shew, that whatever the nature of the tenure is, it is distinct from that of ordinary copyhold, leasehold, or any tenure commonly known; we are, therefore, at liberty to go into evidence to shew, that where a similar tenure exists, certain incidents exist which may evidence those of the manor in question; that the true question before the Court is this, that where peculiar circumstances have created a species of estate which has not yet found its way into adjudication in courts of justice, your lordships are at liberty to look into what belongs to estates of the same nature and tenure in other manors. Now I disregard for this purpose all the little variations that may exist in the custom of various manors. I do not offer in evidence the custom of one manor to explain that of another; far from it. The true understanding and application of the customs of one manor to explain those of another is this,

that the modern tenancy from year to year, called in common parlance, tenancy at will, which in law is merely a renewable and defeasible

estate for years, with all the incidents belonging to that tenure, is not the tenancy at will referred to in the text.

that where the tenants of a manor are disputing amongst themselves, or some third person is disputing with a tenant, you cannot give in evidence the custom of one manor to shew the custom of another; but here the question is, what right the lord has in particular portions of land that appear to be held from seven years to seven years. The question of manor is of no importance (a). Abolish the word "manor" for a moment, and suppose that the grant by the Duke was of so much land, and that it appears he has held a court for this extensive territory, and granted his land in this way for five hundred years—suppose then that a question were to arise respecting the incidents of the grant of one of these parcels, there being no entry in the books to shew what were those incidents, could it be doubted that the exercise of rights under similar grants would be admissible to explain what was the nature of those in question. The defendants have shewn that identity of character by which the whole territory is united, the nature of the tenant's right, whether he or the lord has the soil and minerals, is to be explained by evidence, and evidence only, as the Court cannot infer it from any known rule of law. If this were an ordinary copyhold, leasehold, or freehold, there would be no necessity for evidence to explain its incidents. The plaintiff must not assume it to be the one or the other. Your lordships are looking to see what it is, and if it should turn out that the tenants have had the minerals and the soil, the Court would say this tenure must have been freehold estate; but if it should turn out that the lord has had the minerals and the soil, a different conclusion must be drawn; and so long as it remains in doubt it can only be explained by evidence, and that evidence we now offer. We say that the manors are sufficiently connected, being held under the Dukes of Cornwall for five hundred years, subject to one particular course of jurisdiction and administration; and it appearing that there is in each of the duchy manors a tenure similar to that in the manor of Tewington, we want to shew, that though the conventional tenants have had the

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(a) Talskedy does not appear to be a manor. *Ante*, 153, 230, (a).

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surface for five hundred years, the Duke has retained the mines; and therefore we have a right to know, that whatever it was the Crown parted with in the grant from seven years to seven years, by a perpetual covenant, the soil, or at least the minerals, did not thereby pass. This we propose to shew by evidence of acts done in other manors. Mr. *Brougham* says there is a certain rent in Tewington, called a fine of tin, with reference to the conventional tenants, and he says that does not appear in the other manors. I apprehend the difference in the reservation can have no effect upon the quality of the estate. Mr. *Erskine* says that there appears in the parliamentary survey a difference in the different manors. I apprehend that there is no other difference than what would naturally arise from the commissioners going from one manor to another, and taking the customs as stated by the tenants in the way in which they would state them. All go to that which constitutes the peculiarity of the tenure. All acknowledge that they take from seven years to seven years. This is a peculiar tenure, which did not originate before time of memory. It is for the plaintiff to destroy the inference which must be drawn from the circumstance that these manors are classed together, all having this peculiar incident, an assessment court, and all included within and affected by the same commission. Upon the ground, therefore, that there is a peculiar tenure in a particular district, applicable to a certain number of manors, we are entitled to give this evidence.

*Dampier, ad idem.* Sir Martin Wright, in treating of tenure (a), quotes *Zasius* and *Craig*, as authorities for saying "that, in considering the nature of feuds, the custom of the country where the feud lies is to be nicely observed. "*Natura feodi, ex moribus usure cujusque provinciæ observatis, recepta est.*" Cornwall may be considered not merely as a duchy, but as a province or peculiar district,

(a) Wright, Law of Tenures, 37.

according to the position of Lord *Hardwicke* (a) already (b) cited. In Bracton (c) mention is made of a custom peculiar to Cornwall, that if a freeman married a neif, and had issue two daughters, one should be a neif of the lord, as the mother had been. By the common law both would have been free, and as a freeman marrying the King's neif would have incurred a fine, it seems that the lord in Cornwall was protected in some degree as the King in England. We have seen from what has been read, that in that country the King of England had peculiar power. It was formerly in itself a kingdom, "*Olim cum titulo regni*," as said in Hofman's Lexicon. From its nature, situation, laws and language, it may have been originally a separate kingdom, as Wales or Ireland were, and consequently within the reason of the cases cited (d). My learned friends on the other side have,

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(a) *Dean and Chapter of Ely v. Warren*, 2 Atk. 189.

(b) *Ante*, 247.

(c) Lib. 4, tr. 3, c. 13, sec. 2.

(d) "Neither the ancient territorial earldom nor the duchy of Cornwall appear to merge in the Crown. Thus in 7 *Edw.* 2, the King took the fealty of Joan Crispyn, sister and heir of Roger Crispyn, defunct, for the hamlet of Hemeston Arundel, which the said Roger, her brother, held of the King in capite, *comitatu Cornubiæ in manu regis existente*, per servitium 50 solidorum annuatim ad castrum de Launceneton solvendo pro omni servicio. 1 Abbrev. Rotul. Original. in Scaccario, 203b. Of Reginald de Dunstanville, it said, 'Comitatum Cornubiæ habuit, et omnia quæ ad dominum regem pertinebant.' Plac. in domo capital. Westm. asservat. Abbrev. temp. Rich. 1, &c. 324. This earl accordingly pardoned outlawries, *ibid.* and granted to his burgesses

of Truveru (Truro) to be free of toll 'per totam Cornubiam.' (Plac. de Quo Warranto, temp. *Edw.* 1, 2, 3, 111.) 'These earles and dukes have from the beginning beene priuiledged with royall iurisdiction or crowne rights, namely, giving of liberty to send burgesses to the parliaments, retorne of writs, custome, toll, mynes, treasure-trovee, wards, &c. and (to this end) appoynted their speciall officers, as sheriffe, admirall, receyuer, havener, customer, butler, searcher, comptroller, gaugeor, excheator, feodary, auditor, clarke of the market, &c. besides the L. warden, and those others before remembered, whose functions appertayne to the iurisdiction of the stannary. To the preservation of which royalties, our parliaments have ever carried a reuerend regard, &c.' Carew, Surv. 79. And see further, as to the prerogatives of the dukes of Cornwall, Palmer, 89; Attorney General of *Prince of*

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I contend, fallen into an error respecting ancient demesne. These tenants in convention were not at all like the King's villeins in ancient demesne; they were freemen farming under terms of years. The tenants in ancient demesne, who had peculiar privileges, were more like the fourth class in the assession rolls, the natives of stock. Had a state of villenage never existed, the privileges of ancient demesne, now called customary freehold, could not have arisen, for it is supposed by Blackstone and others, that such freehold could only have been created in consequence of a freeman taking lands held in villenage. Being a freeman he could not be removed as a villein, and he could remove. He held by villein services, but he was in a different situation from a villein, who could hardly have been said "to hold," but was at the lord's will. There seems also another error of my learned friends, the confounding the tenure with the custom of a manor. They laid considerable stress on the fact that the estates were transmitted by different customs in different manors after the death of the tenants; in some cases to the widow, in others to the eldest, or youngest son. The answer is that such customs may naturally arise in different manors according to their situation and character, whether it was maritime, inland, mining or fishing; and would be created by the caprice or indulgence of the lord. But the tenure of such tenants must first be established; their estate in quality and quantity must be first shewn, then those caprices and indulgences of different lords may well supervene, and often be different in the different manors. But the same evidence which will shew the *estate* of the tenant in one manor will shew it in another; though evidence which proves that the estate in one descends in a peculiar way, will not prove that the estate in another manor must descend in a similar way. My learned friend, Mr. *Patteson*, said, that a fine of tin is payable by the common law. The

*Wales v. St. Aubyn*, bart. and s. 5." Mann. Exch. Pract. 2d. others, Wightw. 167; 17 *Edw.* edit. 385 (b) As to the office of 4, c. 1; 2 *H* 7. c. 4; 1 *H*. 8. c. 9, *feodary*, vide *ibid.* 393 (o), 429, n.

lord receives as lord of the soil, by common law, a portion, regulated in its amount only by the law of the stannaries or by custom. That, perhaps, may go some way to explain a difficulty respecting the fine of tin. The freehold tenants appear to pay a quit rent and a fine certain of tin; the former is for the surface, the latter for the subterranean part of their holding. The nature of this province of Cornwall was so well understood, that probably the common doctrine that the ownership of the surface extends to the centre would not have prevailed there in early times. Such an ownership in a mining country would be indefinite in comparison with the same in a merely agricultural country. It may be said that in other parts, mines are conveyed by feoffments without any express mention of them. The answer is, that at the times of such feoffments, no mines perhaps were thought of in those parts, and not reserved. In Cornwall it was different; they were known there from the earliest times. Hence a freehold tenant whose personal services (a) were only considered, would pay a small or quit rent for the surface; he would pay also for the minerals a small or certain fine of tin, as his feoffment, without more, did not extend beyond the surface (b). But the farmer of the land on a term, whose personal services were nothing, and whose farm was the only thing regarded, would pay in the nature of rack rent also for the minerals, if they were demised. As, however, nothing is more uncertain than produce of mines, how was this rack rent to be settled? The way would be to pay a fine proportioned to the produce. Hence the "fine of tin" paid by the individual tenants is in blank, and its amount is given as an average "valet per annum." The ore must first be won, before a fine or rent could be fixed. Then, when the King no longer chose to demise the minerals under these agricultural farms

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(a) Homage created a warranty.  
*Vide* Littleton, sect. 143, Co. Litt.  
 101 a.

(b) It appears in *Curtis v.*

*Daniell*, 10 East, 273, that the freeholders of a Cornish manor had not the tin under their freeholds.

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to the respective tenants, they would cease to pay this rent or fine of tin, and it appears that they cease to pay it, for it is not mentioned after the toll tin of the manors was demised to one person.

*Brougham*, in reply. The defendant's counsel appear to argue in a circle, they beg the question, as is the mode with those who argue in a circle; and they are led into it by the nature of the principle we are discussing, which is, that you are to try the incidents of the tenure in one manor by the examination of another manor of the same tenure. If it were the same tenure in every respect, there would be no occasion to call any evidence. But Mr. *Erskine* has stated the true principle. The tenure must be the same in all particulars, except the particular in dispute. If the matter of fact which gives rise to the question under discussion has never arisen in a particular manor, but in all other respects its tenures or customs resemble those of other manors, you may import evidence from one of these other manors to explain and corroborate the law or custom in the manor in question. It is not easy to keep the question of custom and tenure distinct. When the tenure is, to hold to me and my heirs, according to the custom of the manor, it is impossible to avoid importing the custom into the tenure. It is in vain to attempt to draw a line between the two. No such distinction can be supported. Upon one occasion Lord *Kenyon* expressly says, the custom of one manor and the custom of another is exactly the tenure of one manor and the tenure of another. It is very difficult to draw a line between the tenure and incident; that which determines my holding is parcel of the tenure. If I hold till I commit a forfeiture, that is part of the tenure; yet the custom shall regulate what is or is not a forfeiture. In one manor a forfeiture is incurred by committing waste; but how is that waste which is the cause of the forfeiture to be determined? The holding in some manors is for the joint lives of the lord and the tenant, instead of being to him and

his heirs, the death of either determining the holding. Forfeiture is part of the tenure; I forfeit because I have committed waste. In one manor I have a right by custom to cut trees and dig, and but for the custom it would be waste, and a forfeiture. Then the defendant's counsel, following to a certain degree the nature of the subject, make these assumptions. The Attorney General says they were a great district of manors; he calls them a municipium; the Solicitor General says they formed one uniform district; Sir J. Scarlett says that they were a great part of the country, that sometimes they were called a number of manors, at others, a great district granted to the Duke of Cornwall, but that they were all one and the same thing, resembling each other in all particulars. That is the question, do they resemble each other in all particulars? If they were all the same, *cadit quæstio*; the question is, do the tenants in Tewington hold in the same way as the tenants in another manor? We contend that it is necessary for the other side to begin by shewing that the tenure is the same in other particulars than the particulars in dispute. The Solicitor General says you are not to go so far back as the time of *Richard I.* either to shew a common possession in one lord or to shew the existence of the tenure or custom in dispute, because in no case can living memory go so far back, and in 99 cases out of an hundred, documentary evidence cannot go so far back. I agree to that certainly. But then you must take care that the evidence in the cause, which goes further back, does not negative your position. For though it is upon you to shew to the Court reasonable evidence as far back as you can, that the manors were in the same possession, and that the customs and the holdings were the same; yet after you have gone as far back as you can, if it appear that before that time facts existed inconsistent with your conclusion upon both points, there is an end of your argument. Two of the manors in question, Moresk and Tybeste, having come to *Henry III.* by escheat (*a*) the difficulty in which the defendants are placed is not that they have not

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gone back near enough to the year 1189, to shew unity of possession, but that they have gone too far back to make it possible there should be that unity. They have shewn that eight or nine of these manors were acquired by perfectly different titles, that they came into the Crown in one mode, and out of the Crown in another within the time of legal memory. Sir J. *Scarlett* then says, why might not a copyhold interest grow out of a tenancy for years, as out of an estate at will? It is very possible that this might happen (a). But for two good reasons, these supposed copyholds could not have grown up in this way. In the first place, copyholds must clearly be before time of memory, and in the next place, at the will of the lord; and by Sir J. *Scarlett's* own argument these were leasehold, because in the seventh of *Edward* the 3d, if their evidence is good for anything, from the assession roll there is a commission to lease at whatever rent the commissioners think best for the interest of the lessor, and turn out tenants for their waste, and allow other tenants to come in who might bid over their heads, shewing that, if there was anything in their evidence, this was leasehold, and not copyhold. But there is another reason why it could not be copyhold according to the case of my learned friends. There is a charter of 11 *Edw.* 3, constituting the duchy, which, by the Prince's case (b), as well as the Sutton Pool case (c), is held to be of the force of an act of parliament, and renders the duchy lands inalienable, and there could have been from that time to this no change effected in this estate that involved or implied a departing with any portion of it, and as it was, so it must continue. That is an answer to the idea of implying and inferring acts of parliament. Whilst there is found one existing statute which distinctly enacts that all these manors shall be in the Crown, with all their appurtenances, and all their incidents, and that they shall be inalienable from the

(a) *Vide* Mann. Exch. Pract. 363, 4. (b) 8 Co. Rep. 13.

(c) *Attorney General v. Mayor, &c. of Plymouth*, Wightwick, 134.

duchy, the Court never can presume an act of parliament against it. A legal custom must have a possible legal origin, consequently in the face of an act, which makes such an origin impossible, no enlargement of interest could have taken place. The Solicitor General cited the case of *Stanley v. White* (a). Lord *Ellenborough* there says, "The presumption from the evidence is, that all the land of the belt belonged originally to the same person, and that when he granted it out to others, he reserved the right to the trees then growing, or thereafter to grow in the soil." It was upon this and other decisions of Lord *Ellenborough*, that I founded the objection which I made when this case was last before the Court (b). The Solicitor General also alluded to *Tyrwhitt v. Wynne* (c), which shews, that when once you establish that there is a district having an identity of custom or tenure, you may go from the one to the other for the purpose of explanation or corroboration; and he says, that this may all have been done before the statute of *Quia emptores*, as if it were a question of subinfeudation. Here there is no mesne manor. They are distinct manors vesting in the same person by various titles, and coming from various quarters. There is, therefore, nothing to shew one common nature, or one common holding.

Lord TENTERDEN, C. J.—I am of opinion that the Court is bound to receive the evidence. It appears that there were, before the creation of the duchy of Cornwall, at the time it was created, and since that period, down to the present time, certain courts, held usually from seven years to seven years, under a commission from the lord of the soil, whosoever he might be, directed to certain persons, requiring them to repair to those several manors, then united under one lord, and to hold the courts. In pursuance of this commission, septennial courts were holden in the different manors; one court could not conveniently be holden for all of them, a distinct court was therefore

(a) 14 East, 342.

(b) *Ante*, 133.

(c) 2 B. &amp; A. 552.

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holden for each. If we look at one part only of the evidence, we find that in every instance, in every manor, mention is made of these conventional tenants, who are said to *take*, not to *hold* from seven years to seven years, for the period of seven years. They are distinguished in every one of the manors from the free tenants; and they are distinguished, till the distinction was abolished, from villeins or bondmen. In all the manors, therefore, we find these different classes of tenants, and in all, the conventional tenants take their tenements from seven years to seven years. If there were nothing more in the case before us but what I have mentioned, that alone would be very strong indeed. But there is this; at the time of the survey made under the authority of the Commonwealth parliament, certain commissioners went down to take an account of, and put a value upon, all this property; they assembled before them the tenants of these different manors, and we find that on that occasion in every manor the tenants represented in substance, that although there ought to be these septennial courts, for various reasons assigned, yet that their tenure did not end at the expiration of the seven years, but that they had some further right of renewing. If we take the first head of evidence, *that* makes the conventional tenants all leaseholders; if we take the second, *that* would give them a peculiar character and interest beyond that of mere leaseholders, but it is not necessary now to define what that character may be. The *same* character and interest are given to this class of tenants in every manor. The tenure is one of a very singular nature, unlike anything we know or have heard of in any other part of the kingdom, but as regards all these manors it is uniform and the same. In order to learn the incidents belonging to this very peculiar tenure, and what rights the lord and the tenants have respectively, we must see what has been done throughout every part of the district. Can we learn what the reciprocal rights of the lord and tenants are in one part, without knowing what they are in other parts of the district, the tenements in each

part being holden in the same manner and of the same lord? (a) Without referring to authority, or to any nice rules or technical distinctions; without considering whether in all those manors, at the time when they were in different hands, these several classes of tenants existed, with the same peculiarities of tenure, it appears to me reasonable, when I find they have existed in all these manors from very ancient times, that we should receive evidence of what has been done in all of them, where a question arises in any one manor relating to the respective rights of the lord and the tenants. I do not consider that this is a question whether the custom of one manor is to be given in evidence, to shew the custom of others. The observation made by Mr. *Dampier* is very correct, and it is one that had passed in my mind. If you were to endeavour to shew that in one of these manors the eldest daughter had taken alone, without her sister being joined, we could not receive evidence that in another manor such was the course of descent. So if the inquiry were, whether in one manor the widow was to hold during widowhood, or for life, we could not receive a custom or usage which had prevailed in another manor to explain it; because those are all distinct matters, perfectly separate from the great question in this cause, which is, the character of these tenants, and the rights resulting from this character, to the lord on the one side, and to the tenants on the other.

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BAYLEY, J.—The object of the evidence now tendered is to shew what the rights of the tenants in one manor are by evidence of what rights are exercised by the tenants in other manors. Generally speaking, you cannot prove what is the custom of one manor by shewing the custom of another, unless you shew a connexion between the two, and, probably, unless you can shew also that there has been in former times a superior court for both, at which court the customs which are applied to both may have been created.

(a) *Vide post*, 273, (b).

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In this instance, the different courts are held for each manor separately, but the same person holds the courts in each, and by the same commission. If the question were concerning the custom of this manor, I do not think you would have the power of proving by evidence, resulting from the usage in other manors, what that custom was, whether of descent, or of the widow's right to free bench, or the husband's to courtesy, because all these are collateral to the question of tenure. But in a case like the present, in which you have the terms of the tenancy in very early periods, where that tenancy has continued down to the present time, and is described in terms which throw no light on the question, whether the tenant is or is not to take the minerals, when you find that there are leases from the same person, contemporaneous and in precisely the same words, I think you have a right, after a very long series of years, to inquire whether usage has or has not supplied that which the language of the document itself does not supply. You may inquire what rights the tenants under similar leases have from time to time enjoyed, and what have been denied to them, and thus collect the meaning of the disputed document. A document may be construed by custom, in a way different from that which its language would allow, because by invariable usage similar words in similar documents have been so construed. Thus a grant to *A.* to hold for the lives of *A. B.* and *C. successivé*, upon the death of *A.* to whom would it go? Custom has fixed upon those words the line and course in which property of that description is to pass. In the case before us, I learn from one of the earliest documents, the Extent of the Manors, that there was at that time a description of persons in all those manors who held by free convention; and if the document itself contains the terms of the convention, there is no difficulty; but in that respect the document is totally silent, and states nothing more than that such persons respectively hold certain portions of land at certain rents, giving no explanation of the rights of that particular class. Hence I am jus-

tified in assuming there may be something like general terms upon which the tenants hold in all the manors. Again, when I look at a document nearly contemporaneous, the Caption of Seisin, I find a greater degree of particularity as to the convention; but the instrument is perfectly silent on the subject of minerals, with one exception only, the fine of tin; and upon the subject to which our attention is now particularly directed, the right of the tenant to work copper ore, or to dig for minerals in general, there is nothing stated. When, therefore, of the two most ancient documents, one is perfectly silent as to the terms of the convention, and the other, though it specifies many terms, is not sufficiently specific as to the question in dispute, and when this is the case, not only with respect to one, but all of the conventional tenants in this manor, and when in other manors, where the grants are made by the same commissioners, whether of the Crown or of the Duke, similar terms are used, I think we are justified in presuming that there may be something like general terms upon which the tenants of all the manors hold; and if for a series of years usage has put a construction upon the terms of the grant in one manor, I think that evidence of such usage is admissible to throw light upon the true construction of the same language in another manor. Upon these grounds, the impression upon my mind is, that this is receivable in evidence.

LITLEDALE, J.—I have very considerable doubts upon this question, and am not prepared to say it is admissible. However, not having made up my mind, I need not give any reasons, but should I differ from my learned brothers I will mention it on Monday (a).

PARKE, J. was gone to chambers.

(a) The following passage from Madox's History of the Exchequer, 649, may be thought to throw some light upon this question:—"The Corpus Comitatus consisted of several manors and lands, which being

letten or committed together unto the sheriff, made the fund out of which the annual ferm to the Crown arose. Those manors and lands were such as lay within the sheriff's county. It was so in general. But

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A bill of exceptions lies upon the reception of improper evidence on a trial at bar.

## FIFTH DAY (a).

LITLEDALE, J.—There was a question discussed on Saturday, upon the admissibility of certain evidence. At the time, I entertained some doubt about it. I have considered the point, and I am satisfied with the grounds which were taken by the other members of the Court upon that subject.

*Brougham.* Perhaps upon this point, your lordships will suppose we have now tendered a bill of exceptions, though we have not made up our minds; regularly speaking, we ought to do it at the moment.

Lord TENTERDEN, C. J.—Certainly; you may tender a bill of exceptions if you please.

*Brougham.* We have looked at the statute, (13 *Edw. I.* s. 1, c. 31,) and it makes no difference where the trial is at bar.

(I cannot tell by what accident) there were anciently certain manors lying in Cornwall, which belonged to the ferm of Devonshire. For example, In the 5th year of King *Henry 2*, (b), in the 18th year of the same king (c), in the 7th year of King *Richard 1st* (d), and in the 10th year of King *Edward 1st* (e).” It would seem, however, from the last reference, that the manors there spoken of were transferred to

the ferm of Devonshire, on account of the earldom’s being in the hands of a subject. It appears by an entry in the Communia of the Exchequer, Trin. 18 *Edw. I.* (Mad. 659 (t)), that the sheriff of Cornwall was allowed to pass his accounts by deputy, on the ground of his being detained in Cornwall to make purveyances (providentias) against the coming of the earl (Edmund.)

(a) Monday, 24 Nov. 1828.

(b) Et in terris datis Comiti Reginaldo (Mann. Exch. Pract. 392,) C et xxijl. et xs Bl. de Manerijs quæ pertinent ad firmam de Devenescira. Mag. Rot. 5 *Hen. 2*, Rot. 6, a. Devenesc.

(c) Mag. Rot. 18 *Hen. 2*, Rot. 7, b. Devenescira.

(d) Mag. Rot. 7 *Rich. 1*. Rot. 10. a.

(e) Devon. Thomas del Pyn r. c.

de CCCxijl. et vijs Bl. de firma Comitatus. In Thesuro (nichil); et in Manerijs Cornubiæ quæ pertinent ad firmam Comitatus, Cxijl. et xs Bl.; De quibus Vicecomes Cornubiæ respondere consuevit dum Comitatus fuit in manu Regis; And in other deductions. Mag. Rot. 10 *Ed. 1*. Devon. m. 1. a.

*Stephen Pearce*, toller to Sir W. Lemon, the duchy lessee, proved the receipt of toll of copper, iron, and lead in the duchy land in other manors besides Tewington; that his father, *Stephen Pearce*, was toller to the Lemon family; that when young he had been in the habit of accompanying his father when he received toll. He also stated, that his recollection did not go back so far as 1765; but he produced a book, in his father's handwriting, of that year, not signed by him, purporting to contain a debtor and creditor account of receipts of toll, and said that, as far back as his recollection went, his father, as toller, used to keep similar books.

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*Sir J. Scarlett* then proposed to put in this toll book, contending that the signature of the toller to the charging side of the account was rendered unnecessary by the circumstance of the entries being in his handwriting (a), and of his having been toller at a subsequent period. This is a book found in his custody; annexed to the book is an apparent settlement with him in that character, by a person who is authorized to receive the amount from him. The question is, whether it would not be sufficient evidence to charge him with those receipts, if an action were brought against him, unless he could explain it, by saying that he assisted some other person acting as toller. It is *prima facie* evidence that the tolls were received by him, to be accounted for.

*Brougham*. It does not appear in what capacity this account is kept, or upon whose account the money is received. Another objection is, that where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a statement, unless it were true; but suppose there is in part of the same document in which

(a) *Post*, 269.



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the charge appears, a discharge also, which squares the account, or, it may be, leaves a balance in his favour, then, taking the whole together, both sides of the account, the charge and the discharge, the reason fails, because it no longer is a declaration of a party against his own interest; it may be a declaration for his own interest. Lord *Eldon* said he had had great doubts about these cases, and that he never should be for carrying them further than they had been carried.

LITLEDALE, J.—A man is not likely to charge himself for the purpose of getting a discharge.

It is no objection to the admissibility of a book, containing an account in which a deceased receiver charges himself with money paid to him, that, on the opposite side of the account, the receiver discharges himself to the same extent (b); or that the account, (being in his handwriting,) is not signed by him; or that the name of the party on whose account the money is received does not appear in the book, it being shewn *aliunde* that the person making the entry did not receive the money on his own account.

Lord TENTERDEN, C. J.—Almost all the accounts that are produced, are accounts on both sides. That objection would go to the very root of that sort of evidence. In *Barry v. Bebbington* (a), the plaintiff, who derived title under Lord Barrymore, offered in evidence several items contained in a book in the handwriting of one Ashley, who had many years ago been steward to Lord Barrymore, and was now dead. The manuscript was a common day-book, not particularly appropriated to Ashley's concerns with Lord Barrymore, but containing a variety of other matters relating to his different employers, and the items in question, three in number, were memoranda of receipts of some sums of money by Ashley from different persons by name, but whose situations were not mentioned, for trespasses committed on the common in question, paid on account of Lord Barrymore. The first item was dated in 1739, the last in 1785. This evidence was rejected; and a verdict having been given for the defendant, a new trial was afterwards obtained upon that ground. That is precisely this case; the entries are

(a) 4 T. R. 514.

(b) *S. P. per Gibbs*, C. B., in *Bullen v. Michell*, 2 Price, 399, 413. So in *Stead v. Heaton*, 4 T. R. 669, an entry in churchwardens' accounts, "Received of Haworth, who this year disputed *this* our ancient custom, but who, after we

had sued them, paid it accordingly, 8*l.*, and 1*l.* for costs," was held not only to be admissible, but also to entitle the party producing it to read another entry at the head of the page, stating what *this* custom was.

proved to be in the handwriting of Stephen Pearce the father, and by those entries he admits that he has received certain sums of money.

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The examination of *Stephen Pearce* then proceeded. He proved the perception by himself of tolls in duchy lands, both inclosed and waste, *i. e.* not inclosed; that he had known no mine worked with returns in duchy land for which he had not received toll; and that persons who wished to try for copper or other minerals, except tin, always made a previous application to witness, as toller of Sir W. Lemon, for leave to do so.

*Pearce* having been cross-examined and re-examined without any material result, Sir *J. Scarlett*, by the desire of *Wetherell*, A. G., proposed in evidence those books as far back as the witness himself had attended his father, at the time his father was steward, beginning with the year 1777, in order to support the case of uninterrupted enjoyment, opened by the Attorney-General.

*Brougham*. In *Barry v. Bebbington*, in the first place the receipt purported to be a receipt by the steward, but it secondly purported to be a receipt by the steward on behalf of Lord Barrymore. It was upon that ground that the Court thought it was improperly rejected. The Court said that this of itself would have been evidence to charge the steward, if Lord Barrymore had sued him for that money as received to his, Lord Barrymore's, use. That, therefore, was a charge which he made against himself in favor of Lord Barrymore. Here it is not so; the charge itself is perfectly anonymous; the only thing which brings it home to this person is, that it is in his handwriting. A defect in the entries themselves cannot be supplied by parol evidence. The ground on which these entries have been received as evidence is, that they operate against the person that makes them. It would be going a step further to say, that if you

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find a thing in a man's handwriting, provided it make only a link of evidence, you can supply those links that are deficient in order to make it evidence. Where this evidence has been received, the entry has been complete.

LORD TENTERDEN, C. J.—If you have nothing but the entry, the entry must be complete and perfect; but here you have more than the entry. If there were now an action depending for trial against the executor of Pearce, senior, and the son of Pearce, senior, proved that his father was collector at the time, and that the entries were in his father's handwriting, would not such evidence charge him?

BAYLEY, J.—An entry in a man's own handwriting, charging himself with the receipt of money, is evidence after the party's death. Now this evidence shews that Pearce, senior, received the money. Does he receive it on his own account, or does he receive it for somebody else? This witness tells us that he knows his father was toller and agent for Sir William Lemon at this period, and he goes on and says that he himself actually collected for his father, and that it was a continuation of the old relation subsisting between the father and Sir William Lemon.

LITLEDALE, J.—It is a debtor and creditor account. It does not upon the face of it appear between whom the debt and credit is; but I think that is explained by the son, who says that his father acted as toller for Sir William Lemon, and that he himself assisted in collecting the dues.

The books were then put in.

Several witnesses proved the payment of toll of copper in duchy land to the duchy lessees, and several sets (a) of mines from them were produced.

(a) As to the form and operation of these instruments, *vide Doe d. Hanley v. Wood*, 2 B. & A. 704.

Searches for the interrogatories upon which the answers of the tenants proceeded (a) were then proved. None had been discovered. It was shewn that most of the names affixed to the answers are found upon the assession rolls of the day as being those of conventional tenants.

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*Brougham* renewed his objection to the admissibility of the answers without the articles. This is not that kind of defect which could be supplied by proof of search. In cases where the search and the not finding being proved, secondary evidence is let in, the difficulty arises from the non-production of the original; if it be proved to be lost, the next best evidence is admitted. But the objection here is, that the most essential part of the evidence is not to be found; and the counsel for the defendant have no more right to read the answers without the questions, than they would have a right to read a document which was so mutilated that it was impossible to make sense of it. The questions might qualify those answers which appear to have any meaning, so as to give it a different bearing. The real meaning of those answers cannot be known, although it may be supposed. In *Governor Picton's* case (b), it is said (c) that a written answer must be taken to be unintelligible without having that read to which it was an answer. The Court seemed there to have considered that a party is not allowed, from any thing upon the face of the answer, to say that it was intelligible. In *Hart v. Harrison* (d), the Court appear to have ruled in the same way.

Answers to lost interrogatories may be read as admissions by the answering party, although some of the answers are unintelligible *per se*.

BAYLEY, J.—It has been decided that where an answer in Chancery is offered in evidence, which is an answer to particular questions put by the plaintiff, if the bill be in existence you must have the bill read, but where the bill is

(a) *Post*, 272, &c.(c) *Ibid.* 466.(b) *Res v. Picton*, 30 Howell's State Trials, 225.

(d) 1 Ford's M. S. 145; 2 Stark. Evid. 372.

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lost, then, though you cannot read the answer as an answer, yet, as against the party answering, you are at liberty to read it as something said or written by that party (a). Now here, if the person had signed what he had said upon the subject, it would have been admissible in evidence; and what he has written is evidence.

*Follett*, in support of the objection. I submit that this is not evidence, upon one of the rules that I have heard your lordships say is most inflexible—that you cannot take a part of a person's answer against him without the whole being read. Here it appears that you cannot have the whole, because some of the answers are in this form: "we know of none," "we do not know." Your lordships cannot understand the meaning of such expressions, for you have not the questions; if you had those questions they might explain or qualify all the other answers which appear intelligible, and might put a different construction upon them. With regard to the case of the loss of a bill in Chancery, I submit that an answer in Chancery is always intelligible without the bill; it is a full statement upon the face of it. The objection to receiving depositions without the bill arises from the necessity of proof that they have been taken by authority in a judicial proceeding; but no case has said, that if you find a part only of an answer, that would be evidence against the party. In Governor *Picton's* case a paper was put in in the handwriting of Governor Picton, in language intelligible, "apply the torture to Louisa Calderon." (b) But it appeared that the paper written by Governor Picton was in answer to a letter sent by the Spanish authorities to him; and Lord *Ellenborough* said, "I will not receive Governor Picton's answer without the original letter, because that may explain the answer which Governor Picton gave." Supposing even that these answers were all intelligible without the questions, this rule would apply;

(a) So ruled in *Hart v. Harrison*, 2 Stark. Evid. 372.

(b) "Appliquez la question à Luisa Calderon." "Let the tor-

ture be applied to Louisa Calderon." The formula in *Howell*, whether intended to be French or Spanish, is evidently incorrect.

but the greater part are unintelligible; and therefore the effect would be to receive part instead of the whole. In *Wheeler v. Atkins* (a), Lord *Ellenborough* would not allow one interrogatory to be abandoned upon depositions put in, without abandoning the whole. These answers being answers to questions propounded, they must be taken all together, because one answer may qualify the others, and give a different meaning from that which would be the apparent sense, if we were not to look at the questions to which the answers refer.

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LORD TENTERDEN, C. J.—I am quite satisfied that we ought to allow these answers to be read. If there be any obscurity in them, that will take away from their effect; but we cannot refuse to let these answers be read, because we are not able to ascertain what the questions were to which the tenants answer, “we do not know.”

BAYLEY, J.—I quite agree to the case cited by Mr. *Follett*. There the witness had in his possession part of a document which might have thrown light upon the rest, and have qualified the evidence; and having that evidence in his power, he desires to withdraw it from the consideration of the Court, and to put in that which, upon the face of it, would be a garbled and imperfect account. Here the defendant only adduces that which, as far as is within his power, is perfect. In the absence of the interrogatories we shall see from the document itself whether it be or be not fairly and distinctly intelligible.

LITTLEDALE, J.—I quite concur in the opinion expressed.

The answers of the tenants of certain of the assessionable manors, including Tewington, were then put in and read. The earliest were entitled, “the answers of your majesty’s tenants within the manors of Tewington, Penkneth, Restormel, and Penlyn, unto the interrogatories ministered to them by John Connyer, esq. and others, your majesty’s commissioners, by appointment made 7 October, 12 year

(a) 5 Esp. N.P.C. 246.

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of your majesty's reign, A. D. 1570." The following answers appeared to bear upon the question of ownership of the soil, and the nature of the estate by convention.

"To the second, they know none for Tewington and Penkneth; but for Restormel and Penlyn, by virtue of a warrant from the steward, according unto the custom, there are some cut to the queen your majesty's use, and to the use of the tenants for reparation.

"To the fourth, they claim an estate of inheritance *by commission* (a), according to the custom of the dukedom (b) of Cornwall, unto them, their heirs and assigns.

"To the fifth they say, that the wife, after the death of her husband, had as good estate as her said husband before had, according unto the custom; and more for answer saith, that at a sessions of commissioners from the prince, holden about 21 years hence, then order by the commissioners was taken that the wife should have it during her natural life, (and no longer,) and after to remain to the right heir of her husband, conditionally, that all estates made before should stand in effect, and all estates made since the said order by the said wives not to impeach the heir in anywise.

"To the sixth they say, that a heriot is due upon every tenement that hath been accustomed to pay within the memory of man.

"To the seventh they say, that a new knowledge is to be paid by him that taketh at the next sessions after, and no heriot, and to have three years daies of payment.

"To the eighth, they know none in Tewington and Penkneth, but in Restormel and Penlyn they have had ac-

(a) "In the King's case this word *Committo* doth amount sometime to a grant, as where he saith, *Commisimus W. de B. officium seneschalsie, &c. quamdiu nobis placuerit*; and by that word also he may grant a lease." Co. Litt. 45 b. "The course of the Exchequer is to make leases by the words *committimus* such and such lands, *habendum, &c.*, rendering, &c. And

this is a good lease by ancient usage." Bro. Abr. *Lease*, pl. 61: Here, however, "the estate by commission" may merely mean the estate granted by the commissioners, by virtue of the commission.

(b) Here the custom appears to be treated not as a manerial custom, but as a custom pervading the dukedom, *q. d.* the 17 assessionable manors.

ording unto the custom, by grant of the steward to the Queen's Mat<sup>ies</sup> use, and to the use of the tenants of the said manors.

"To the ninth, there are none to work without licence.

"To the tenth they say, that by surrender in open court before the steward and tenants of the manors, they may depart their interest of the premises without licence, and also for causes in extremities before the said steward, reeve, and two of the tenants, they may surrender lawfully.

"To the sixteenth they say, that if any person be in possession, and no claim made by the space of three sessions, it doth then bar all claimers except a child within age, or any person in prison or out of the realm, or a woman covert-baron."

It was stated that the answers given 23 Eliz. and some others in that reign, were returned into the duchy office, but that, not being signed by the tenants, they were not offered in evidence.

The next answers read were entitled, "Manerium de Tewington." "The answers of the tennents of the said mannor to the articles exhibited to them by his Maj<sup>ties</sup> Comm<sup>rs</sup> at the assession held for the said mannor at St. Austell the 20th day of October, 1669." (a)

"To the first article we say that we claim an estate of inheritance to us, our heirs and assigns, for ever; according to the custom of the said manor; and that some hold by descent and some by surrender, but how much by descent and how much by surrender we refer ourselves to the records; and under the rents and fines usually paid, as appears by the session roll of records, as also who were owners of the said lands before we had the same.

"To the second article we say, that a heriot is due upon the death of every tenant who, at the time of his death, hath a heriotable tenement, and that there is but one heriot due, although he have several takings and tenements.

(a) As to the articles and answers at the assession holden during the parliamentary alienation of the manor of Tewington, in the time of the Commonwealth, to Menheire, *vide post*, Appendix, I.

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Further we say, that every surrender must pay a new knowledge, that is to say, double the rent and fine, to be paid by equal portions in three years after the assessions; but what the yearly value or number of acres of every heriotable tenement is, we certainly do not know, neither do we know of any heriot or best beast that hath been detained from his majesty since the last assession.

"To the third article we say, that since the last assessions of the said manor the defaults of reparations have been at several law courts presented by the reviewers thereof, appointed for that service within the said manor, whereunto we refer ourselves.

"To the fifth article we say, we know not of any wastes or spoils that have been committed or done by any tenant or tenants within the said manor, either in houses, gardens, orchards, woods, or inclosures, other than what hath been presented, as in our answer to the third article is expressed; neither do we know of any customary tenants within the said manor which hath sold or disposed of any timber trees from his or their customary tenement or tenements where any such trees did grow, other than what hath been sold by John Daddow, of Trenoweth, and two trees sold by John Bond, of Trenaron, who hath planted many more in their room, but for what sum or sums of money we do not know.

"To the ninth article we say, that there are certain quarries of slate within the manor held and enjoyed by Oliver Saule, esq. under the yearly rent of 6s. 8d., which he took before this assession; and one other quarry held by Francis Scobell, under the yearly rent of 20s., before this present assession; and other freestone quarry (a) held by Marke Higman, by the yearly rent of 1s. 3d., which he took before this assession. Further we say, we know no tin works within the said manor but such as are kept under bounds, which do belong to the owners thereof; and when any tin is wrought, the tenth part thereof ought to be paid to the lord of the manor for toll thereof.

(a) *Ante*, 202.

"To the tenth article we say, that the commons of the said manor do belong to the tenants of the said manor undisturbed, who have always enjoyed the same under the yearly rent of 33s. 4d., as by the records thereof remaining with the auditor (a) of the Duchy of Cornwall appeareth, unto which, for the more certainty, we refer ourselves.

"To the eleventh article we say, that the heriots, rents, fines, issues, amerciements, and all other duties, are yearly collected by the reeve of the said manor, and we believe are accordingly answered; which is as much as we can answer to this article.

"To the thirteenth article we say, that when a customary tenant dieth without surrendering his tenement, and the wife surviveth, then is the wife to have an estate therein for term of her life, and after decease to the eldest son of the customary tenant; if there be no male child living, then the eldest daughter; but if the land come by the woman, then it is lawful for her and her husband to dispose of it, by surrender, at her pleasure; but, having a husband, cannot surrender to the husband, nor without her husband.

"To the fourteenth article we believe, that when any customary tenant dieth seised of any customary tenement within the said manor, having no heriotable beast at the time of his or her death, the next heir ought not to be charged therewith; for that the land descendeth to him by custom, free of all burthens whatsoever, other than what belongeth to his majesty therefore, during the time of his tenancy; neither have we known the executor of the tenant at any time charged therewith.

"To the fifteenth article we say, that the fines, amerciements, and other casual profits accruing yearly to the lord, are estreated yearly by the steward, and collected by the reeve, and accounted for at the audit; but what it may amount unto yearly we know not, but refer ourselves to the record."

(a) *Ante*, 171.

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The answers in 1683, 1691, 1703, 1710, and 1717, were then produced, signed by persons whose names appeared as conventional tenants on the contemporaneous assession rolls; but no parts were then read except the titles (a), and the answers to the fifth article in 1691 and 1717, stating that no waste had been committed, and that no trees or timber had been sold by the customary tenants.

The answers of 1724 were then read.

"To the first article we say, that there are no persons within the said manor who hold any part or parcel thereof for term of life or lives, or by copies (b), or for years, to the best of our knowledge, but all and every part thereof is held by the customary tenants thereof, from seven years to seven years, to us and our heirs and assigns for ever, according to the custom of the said manor, but what lands they severally hold, or the true quantity or quality, or the yearly value thereof, or what rents they severally pay, we do not certainly know, but refer ourselves to the steward's books and the ancient duchy records.

"To the fifth article we say, we know not of any spoils or wastes that have been committed or done in houses or other matters contained in the said article. And that (c) the tenants may fell any timber trees without the leave of the lord, &c., which we refer ourselves to the records of the ancient duchy of Cornwall. And (d) we humbly conceive that the customary tenants may fell timber to build houses, &c., for the benefit of the said manor, or sell (e) the same at their will and pleasure, according to the best of our knowledge and belief (f).

(a) "The answer of the jury of the said manor to the articles ministered to them at the assessioning courts for the manor aforesaid."

(b) If the copy of court-roll were the primary evidence of the tenure, this statement would appear to be incorrect.

(c) In the original, the words

"And that" are written over "But whether" thus:

And that  
~~But whether~~

and the ink is of different colours.

(d) "But" is struck through, and "And" written over, as above.

(e) Something here also peculiar in the original.

(f) As to this claim see Mann. Exch. Pract. 2d edit. 390, n.

"To the ninth article we say, there are certain quarries of slate within the said manor held and possessed by Joseph Sawle, esq. under a certain rent; and by Francis Scobell, esq. under one other certain rent; and one other freestone quarry held by the said Joseph Sawle, esq. and John Woolrige, gentleman, under a certain yearly rent. Further, we answer and say, that for tin mines that did belong to the late Kings or Queen, or now belong to the present duke, we know not, except some few tin works and stream works on a common called Gwallan Moor, in St. Austell Downs; but what profits have accrued to the duke or to the bounders we certainly know not."

The answers of 1732 were put in.

The first four answers were the same as in the last.

"To the fifth article we say, that we know not of any spoils or waste in houses or other matters in the said article expressed; but as to the customary tenants felling of timber trees, we humbly conceive that they have a right so to do at their wills and pleasures."

In the answer of 1738, to the fifth article, the tenants claimed that they, as tenants of a customary inheritance or freehold, might sell and dispose of the timber trees, or any part thereof, at their wills and pleasure.

In 1773 (a) the answer to the fifth article was as follows:

"To the fifth article they say, that they know not of any wastes or spoils committed for felling of timber trees or otherwise within the said manor: and they further say, that by the ancient custom of the said manor the tenants thereof have always cut, had, and taken, at their will and pleasure, stake-boote, fire-boote, and frith-boote, growing upon their own particular tenement and tenements and lands, for their own particular use; and they also say, that by the ancient custom of the manor the said tenants thereof have always and at all times felled, cut down, had and taken, at their will and pleasure, all timber trees and saplings likely to become timber, and all other trees and saplings of what sort soever grow-

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(a) Signed by Wm. Withiel, the then tenant of Lamellyn.

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ing in and upon their own respective and particular tenement and tenements and lands, for their own particular use, benefit, and profit, and for their own needful and necessary reparations of and for their houses, fences, and gates, and for their utensils in husbandry, and for all other their necessities and occasions. And the said tenants do further say, that all timber trees and saplings likely to be timber, and all other timber trees whatsoever, growing upon and within the said manor, by the ancient custom of the said manor, do all belong to the tenants on whose tenement and tenements and lands the same timber trees and saplings shall and do grow; and the same timber trees and saplings have always heretofore, time out of mind, been cut, sold, taken and disposed of by the tenant, at his will and pleasure, on whose tenement and tenements and lands the same timber trees and saplings have grown, and not by the lord of the manor, or any other person or persons whatsoever."

A witness next proved the holding of a Court of Assession in Tewington by Rashleigh, as steward, in 1793, &c.

Evidence was then given of acknowledgments on the part of *Rowe*, the testator, that the right to the mines under duchy lands was in the lessees of the duke.

The conveyance to Rashleigh of the manor of Tewington (a), under the land-tax redemption acts, was then put in and read. It appeared from this instrument that the mines, and a right of entry to work them, were thereby reserved to the Duke of Cornwall (b).

Here the defendant's case closed.

(a) 1793.

(b) At the trial before *Park, J.*, in 1826, (*ante*, 133,) the learned Judge relied upon this reservation as evidence that the right to the minerals was not in the conventional tenant *claiming* (upon the purchase by Rowe in 1814,) *under a subsequent admittance by Rashleigh*. On the argument upon the

motion for a new trial, however, it was admitted that the interest of Rowe, the *cestui que trust* of Wood, the surrenderee of Pearce, would depend upon the interest of the surrenderor, the whole of whose estate passed to the surrenderee unaffected by any thing done by the admitting lord; the act of admittance being merely ministerial.

The plaintiff then called evidence in reply.

Mr. *Edward Cooke* stated that he was appointed steward of the manor of Tewington in 1801, and was now steward to Mr. Sawle, the present lord; that Mr. Rashleigh was appointed steward by the late King, during the minority of his present Majesty, and was succeeded by Mr. Cruise, who was succeeded by his nephew, who was steward when Mr. Rashleigh purchased the manor. The witness stated that he holds a court annually at Michaelmas, at the Market-house at St. Austel, which is attended by an indefinite number of customary tenants, generally eight or ten; that he holds no other court except special courts to pass surrenders, which are held when applied for; that these special courts are also held at the Market-house of St. Austel, and are attended by two customary tenants, the steward, the surrenderors and the surrenderees; that surrenders are passed by the delivering of the rod; that the new taker is also admitted by the delivery of the rod, and takes the oath of fealty; and that a copy of court-roll on an *ad valorem* stamp is delivered to him by the steward. The manor book from which the copies of court-roll are prepared was produced.

The counsel for the defendant here urged, that the plaintiff having in the outset given evidence of possession, he had no right now to support that possession by evidence of title; and *Rees v. Smith* (a) was cited. But as the defendant's counsel rather protested against the course proposed to be taken by the other side becoming a precedent, than required the rejection of the evidence in the present instance, Lord *Tenterden* said, "as they do not object, you will go on."

The counsel for the plaintiff then proceeding with their evidence in reply, the following surrender (b) was read:

(a) 2 Stark. N.P.C. 31; the accuracy of which report was confirmed by Sir *J. Scarlett*.

(b) This is the conveyance under which the plaintiff's testator claimed.

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" Manor of Tewington. At a special court held at the Market-house in the parish of St. Austel, in the county of Cornwall, within and for the said manor, on Saturday the 5th day of November, in the 55th *George 3, &c.*, before Edward Coode, gentleman, steward, and George Tallack and William Webb, two of the customary tenants of the said manor: To this court came William Pearce, of the parish of Lanteglos by Fowey, in the said county, gentleman, eldest son and *heir, according to the custom of the said manor*, of John Pearce, yeoman, late one of the customary tenants of the said manor; and having been admitted tenant, according to the custom of the said manor, of and for the messuages, lands, tenements, parts, shares, and hereditaments hereinafter described; and having made his fealty in consideration of the sum of 1400*l.* of lawful money, &c., to him paid by Benjamin Wood, of the borough of Penryn, in the said county, gentleman, surrendered into the hands of Charles Rashleigh, esq. lord of the said manor, by the acceptance of the same steward, all those messuages, lands and tenements, with the appurtenances, situate and lying in, and parts and parcels of, the village and fields of Nannemellyn, and parish of St. Austel aforesaid, parcel of the customary lands of the said manor, being 20 parts in 42 parts of four messuages or tenements in or parts of Nannemellyn aforesaid, formerly in the possession of William Withiel, late of the said John Pearce, and since of the said William Pearce, his undertenants, &c., upon condition and to the intent that the said Benjamin Wood might be admitted tenant thereof. And thereupon to the said Court came the said Benjamin Wood, and took out of the hands of the said Charles Rashleigh, lord of the said manor, by the delivery of the said steward the aforesaid messuages, &c. To have and to hold the said messuages, &c., *to him the said Benjamin Wood and his heirs for ever, according to the custom of the said manor*, under the yearly rent, dues, duties, suits and services thereof, heretofore due and of right accustomed to be paid and performed for the same:

and the said Benjamin Wood was admitted tenant thereof accordingly, by the pledges of the said George Tallack and William Webb, as well for the rent and other dues to be paid, as for the reparations and other suits and services to be done and performed; and thereupon the said Benjamin Wood made his fealty to the said lord of the said manor, and so forth. Given under the hand of the said steward the day and year above written. *Edward Coode*, steward."

The same witness also stated that the customary tenants sometimes leased their tenements for terms of years and for lives, and sometimes granted them by covenant(a); that the former had been the more usual course of late years; and that in neither case did they apply for a licence.

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*Mr. Edward Coode* proved the sale of timber from a customary tenement called Trevissick, by *Mr. Gulley*.

A lease was produced from the Duke of Cornwall to *Rashleigh*, 21 December, 1792, of "all that part or parcel of the common called Gwallen Porthmellyn and Towan, and commonly known by the name of St. Austel Foredown, within the manor of Tewington, and all mines and quarries, &c.

A set of copper in the mine of Gewan in St. Austel Foredown, 29 October, 1768, from the executors of *William Lemon* to *Michael Ferris*, was put in.

The manor books of the manor of Tewington were put in (c), and the following entries were read:

"Manor of Tewington to wit. A court of and for the said manor, held for his Royal Highness George Augustus Frederick Prince of Wales, Duke of Cornwall, and so forth, held at the Market-house in the town of St. Austel, on the 12th day of September, in the 33d year of, &c., before

(a) As to this mode of avoiding the forfeiture of a copyhold, see *Richards v. Sely*, 2 Mod. 80.

(b) Tuesday, 25th November, 1828.

(c) Produced by *Mr. Edward Coode, jun.* from the muniments of *Joseph Sawle Sawle, esq.* the present lord.



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Nicholas Cruise, gentleman, deputy steward of the same manor: At this court came John Pearce, one of the customary tenants of the said manor, and surrendered into the hands of the said lord duke all those messuages, lands, and tenements, with the appurtenances, situate and lying in, and parcel of, the village and fields of Nansmellyn, and parish of St. Austel aforesaid, parcel of the customary lands of the said manor, being twenty parts in forty-two parts of four messuages and tenements in other parts of Nansmellyn aforesaid, now in the possession of the said John Pearce, of the parish of St. Blazey, in the said county, yeoman; upon condition and to the intent and purpose that he the said John Pearce might have and take the premisses aforesaid, with the appurtenances, to him the said John Pearce, his heirs and assigns for ever, according to the custom of the said manor. And thereupon at the said court came the said John Pearce in his proper person, and took of the said lord duke the said several messuages, lands, tenements, and premises, parts and portions of messuages, lands, tenements, and premises, with the appurtenances; by the delivery of the said Nicholas Cruise, deputy steward of the manor aforesaid: To have and to hold the said tenements and premises, with the appurtenances, unto the said John Pearce, *his heirs and assigns for ever*, according to the custom of the said manor, under the ancient rents, heriots, and other services from the same due and of the right accustomed; and he gives unto the said lord duke for a fine 8*d.*; and he hath done his fealty, and found pledges, as well for the payment of the rents as for doing and performing the reparations and other services, to wit, ——— and ———, two of the customary tenants of the said manor; and thereupon he is admitted tenant. Given under the hand of the deputy steward, the day and year and place aforesaid. (Signed) *Nicholas Cruise*, deputy steward."

A surrender of Towan in 1661 was then produced (a).

(a) From the muniments of Towan, and lord of the manor of Mr. Sawle, the present owner Tewington of the conventional tenement of

" At a special court of the manor of Tewington, held at Towan, within the manor aforesaid, the 16th day of May, in the 13th year of the reign of King *Charles* the Second, now King of England, and in the year of our Lord. 1661: At this court before the steward of the said manor came Oliver Sawle, esq. and surrendered into the hands of the Lord the King all those messuages, lands and tenements, with the appurtenances, called Towan, within the manor aforesaid, with this intent, and under the condition that Joseph Sawle, gentleman, the aforesaid messuages, lands and tenements, with their appurtenances, might have and hold *to him and his heirs*, according to the custom of the manor aforesaid, except and reserved out of this surrender to the aforesaid Oliver Sawle, and his assigns, the Ham Park, the Ham Park Meadow, the Grigland, the Nurseries of Ash at Towan, Shepherd's Hill, together with the moors under the same, and the pasture and lopping of Tewington Wood, otherwise called Fentengellan Wood: And thereupon at the same court came the aforesaid Joseph Sawle, and took of the aforesaid Lord the King, lord of the manor aforesaid, by the hands of the steward, all the aforesaid messuages, lands and tenements, together with their appurtenances, except as before is excepted: To have and to hold *to him and his heirs for ever, according to the custom of the said manor*, by the rents and services therefore due and of right accustomed; and he gives to the lord for a fine, according to ancient recognizance, 6*d.*; and he did his fealty thereof to the lord; and finds pledges as well for payment of the rent and repairs, as for doing and performing the other services, David Moyle and Henry Carlyon; and he is admitted tenant. *Samuel Hext*, steward there."

The court-roll of 8 March, 1774, of Nansmellyn, was read.

The court-roll of 13 August, 1725, was read:

" Manor of Tewington. At a court held of the manor aforesaid, 13 August, 12 *Geo.* 1, (1725,) before Edward Rickford, deputy steward, Richard Pearce, Thomas Bond, and

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other tenants of the said manor, came John Rosevear, one of the customary tenants of the manor aforesaid, and surrendered into the hands of the lord two tenements, with the appurtenances, in or called Lamellyn, otherwise Nansmellyn, situate in the parish of St. Blazey, and parcel of the customary lands of the manor aforesaid, with all other lands and tenements of the same John in the same, upon condition that Richard Rosevear may have the premises *to him, his heirs and assigns, for ever, according to the custom of the manor aforesaid.* And thereupon at the same court came the aforesaid Richard, and took of the lord the premises aforesaid, with the appurtenances; To have and to hold *to him, his heirs and assigns, according to the custom of the manor aforesaid,* under the ancient rent and of right accustomed; and he demands, &c., and so is admitted tenant thereof, and gives to the lord for a fine 6*d.*; and does fealty; and finds pledges, as well for paying the rent as for doing and performing the reparations and other services, Richard Pearce and Thomas Read.”

The roll of 1693 being called for,

Lord TENTERDEN, C. J.—It is an extract, not properly a roll.

*Erskine.* It is in the form of a roll; it is a roll of extracts.

The document was then read :

“ To this court came Hugh Williams, gentleman, one of the customary tenants of the manor aforesaid, and surrendered into the hands of the Lord the King and Lady the Queen, before Samuel Hext, deputy steward of the manor aforesaid, one messuage and tenement, with the appurtenances, called Lamellyn, otherwise Nansmellyn, situate, lying, and being in the parish of St. Blazey, in the county of Cornwall, which the same Hugh Williams lately had, by the surrender of one John Rouse; To this intent that John Pomeroy, merchant, may have and hold the same, &c.,

according to the custom of the manor aforesaid." The tenement is stated to be taken at the ancient rent; and the surrenderee gives pledges, as well for the payment of the rent as for doing and performing repairs; and the names of the two pledges are given.

A surrender of Nansmellyn in 1692, from John Bonney to Digory Toukin, *habendum* to him and his heirs for ever, was then read. Other surrenders of part of Nansmellyn were then put in; then the surrender from John Killiowe to Bennett and Bonney. No other surrenders or admissions relating to Tewington were read from the Augmentation Office.

It was here observed by the counsel for the defendant, and assented to by the Court, that all these documents were headed *cur. special.*

*Erskine.* One inference is, that it must have been a manor court (*a*).

LORD TENTERDEN, C. J.—Perhaps another inference may be, that it was all a very irregular proceeding. At present, however, I do not draw any inference.

The surrender from John Bonney to Bennett Laa, 23 *Car.* 2, was put in by the defendant, in which the *habendum* was to the surrenderee *and his assigns*.

The plaintiff then put in the examined copy of the sheriff's account, 16–17 *Edw.* 2, (1323,) (*b*). "The account of the sheriff and steward of Cornwall, of the issues of the castles, manors, shrievalty, and stewardship of the county aforesaid, from the Feast of St. Michael, in the 16th year, unto the Feast of St. Michael, in the 17th year of the reign of King Edward, son of King Edward. Tewington.—The same renders account of 25*l.* 3*s.* 8½*d.* of rents of assize of the manor aforesaid by the year, and of 14*s.* 7*d.* of a certain

(*a*) *Vide post.*      (*b*) From the Treasurer's Remembrancer's Office.

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rent called berbiage (a), and of 20s. of a certain custom certain, (b) (*de quâdam certâ consuetudine*) called fine of tin, and of 23s. 11½d. of works, as well of free as of customary tenants released by the year, and of 11d. of chevage (c), and of 3s. of toll tin this year, and of 4s. of fishery; of wood and pannage, and dead wood, nothing this year, because the wood is altogether waste, and of 3d. of honey; of the seaway of Deuborth nothing this year, because the said way is not used this year on account of the sand; and of 61s. 8d. of two water mills demised to farm by the King's commission, with 15s. of increase, (*de-incremento*), and of 31s. 8d. of certain land of Wallan, and the waste of Tewyn, with pasture in the wood there, and a certain place to build a mill so demised to farm to Alexander de Cantok and William de Paffard, by the commission of the Lady the Queen (d); and of 64s. 8d. of fines, pleas, and perquisites of courts there, by the same time. Sum, 36l. 8s. 5½d. Expenses: The same accounts in allowance of rent of the reeve for his service by the year, 5s.; and in tithes paid for berbiage, of ancient custom, 17½d."

The account of 9-10 *Edw. 2* was produced (e). "The account of Richard de Hewish (f) of the issues of the stewardship of the county of Cornwall, to wit, of certain castles, and of all the lands and tenements, with the appurtenances in the said county, which by the death of Peter de Gaveston,

(a) *Ante*, 155.

(b) *Post*, 320.

(c) *Ante*, 151.

(d) *Ante*, 155. The mention in this document of lands demised by the King's commission, and of other lands demised by the Queen's commission, seems to indicate the existence of two assessions prior to the earliest assession roll produced, (7 *Edw. III. ante*, 171, 179,) and to weaken the presumption, (*post*, 317,) that this was an encroachment of Queen Isabel's.

(e) From the Pipe Roll of the Exchequer.

(f) See a record of the preceding year, cited in *Madox's Exch.* 265. "Mandatum est Ricardo de Hywysh, vicecomiti et senescallo Cornubiæ, quod de denariis provenientibus tam de exitibus vicecomitatus prædicti, quam de coignagio Stagminis, et aliis exitibus senescalcie prædictæ, sine delatione liberari et habere faciat dilecto et fideli regis, Antonio de Pessaigne, de Janua, 372l. 14s. 4d. in quibus rex ei tenetur. T. W. de Norwico, Thesaurario, &c. 20th day of January. *Ilil. Brevia irrot.* 9 *Edw. 2*, Rot. 161, a."

formerly Earl of Cornwall, came to the hands of the king, except the castle and manor of Trematon, (but the same Richard ought to answer of the issues of the castle and manor of Trematon, because the commission of the aforesaid Richard in the *originalia* of the 9th year, speaks of all the castles and manors in the whole county, and it is answered in the exannual roll (a) of Cornwall,) to wit, from the feast of St. Michael, in the 9th year of the reign of King *Edward*, son of King *Edward*, until the 15th day of May next following, by the king's letters patent, before he delivered the custody of the castles, lands and tenements aforesaid, to Henry de Willington (b) by the king's writ, to hold so long as it pleased the king, to wit, for the first half year and six weeks of the same year, from which day the same Henry ought to answer. And he answers in roll 9 of the roll of accounts, the first half year and six weeks of the new year. Tewington.—The same renders account of 12*l.* 11*s.* 10½*d.* of rents of assize of free tenants and others of the manor of Tewington, for the terms above said, as is contained in the said roll of particulars, and of 14*s.* 7*d.* of the rent called berbiage at the feast of the Invention of the Holy Cross, and of 23*s.* 4*d.* of two water mills, so farmed by the time aforesaid, and of 12*s.* 11½*d.* of pasture in different places sold; and 11*s.* 11½*d.*, of customary works released, and of 20*d.* of toll of tin, and 2*s.* of a certain fishery there put to farm by the same time, and of 46*s.* 5½*d.* of fines, pleas and perquisites of courts there by the same time, as is contained in the roll of particulars. Sum of the receipts, 18*l.* 4*s.* 10½*d.* Expenses—The same accounts in acquittance of rent of the reeve there by the time aforesaid, 2*s.* 6*d.*, and in tithes paid for the rent called berbiage at

(a) In the old way of exhibiting sheriffs' accounts, the illeivable fines and desperate debts were transcribed into the *exannual* roll; which was yearly read, to see what might be gotten. Hale's *Sheriffs' Accounts*, 67.

(b) Henry de Wylinton was com-

mittee of the earldom of Cornwall, 9 *Edw.* 2. *Abbreviatio Rotulorum Originalium in Scaccario*, vol. i. 226. In 23 *Edw.* 3, Henry de Wylinton held the manor of Fawinton, ut de Castro de Launceneton. *Calend. Inquis. post Mortem*, vol. ii. 152.

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the time of the Invention of the Holy Cross, of ancient custom  $17\frac{1}{2}d.$ , as is contained there. Sum of expenses  $31s. 11\frac{1}{2}d.$  And he owes  $18l. 0s. 11d.$  And he answers within."

The roll of particulars (a) 5-6 *Edw. 2*, was then read. "Particulars of the account of Thomas de la Hide (b) of the issues of the stewardship of Cornwall, beginning on the 19th day of June, in the 5th year, finishing in the 6th year before he delivered the same office to John de Bedewynd." Tewington:—The same renders account of  $6l. 5s. 11d.$  of rents of assize in the manor aforesaid of the said term, with  $1\frac{1}{2}d.$  of the bede of the mill of Pentewyn for the said term; of berbiage nothing, because at the feast of the Invention of the Holy Cross; of fine of tin, nothing, because at the feast of St. Michael; and of  $12s. 2d.$  of two mills so demised to farm of the said term; of chevage nothing, because at the feast of St. Michael; and of  $5s. 8\frac{1}{2}d.$  of the pasture of Wallan, for the said term; and of  $9d.$  of pasture in the wood for the said term; of pannage, toll tin and dead-wood nothing, because at the feast of St. Michael; and of  $12d.$  of the fishery so demised to farm for the said term; of honey and turbary nothing by the said term; and of  $6s.$  of works and customs released for the said term; of —(baticis) nothing by the said time. Sum, £——. Perquisites: the same renders account of  $13d.$  of Robert Petiz and his four companions for false claim, licence to grant, detention, and default: Sum, £——. Sum total, £——. Allowances: the same accounts in acquittance of rent of the

(a) This was stated always to go into the Exchequer.

(b) Madox, p. 639, has the following note:—"Cornubia. De comitatu et senescaliâ commissis. Rex xxv die Junij commisit *Thoma de la Hide* comitatum Cornubiæ cum pertinentijs, necnon Castra de Tintagel, Restormel, et Tremeton, et omnes terras et tenementa ac Stagnariam et Cunagium in eodem comitatu: custodienda quamdiu Regi placuerit: ita

quod de exitibus inde provenienti-  
 bus Regi respondeat ad Scaccarium  
 Regis. Et mandatum est archie-  
 piscopis, &c., quod eidem *Thoma*  
 tamquam vicecomiti comitatus  
 prædicti et custodi castrorum terra-  
 rum et tenementorum senescaliæ  
 Stagnariæ et Cunagii prædictorum,  
 in hijs quæ ad officium vicecomitis  
 et custodiam illam pertinent, in-  
 tendentes sint, &c. Teste Thesau-  
 rario, &c. *Trin. Commission, 1 Edw.*  
*2, rot. 14, b. in imo.*"

reeve 15*d.* for the said term. Sum, £——. And he owes £——.

Another account of 5 *Edw.* 2 was then read.

The account of 32-33 *Edw.* 1 was then read (a).

The roll of particulars for this year was not found.

The account of 31 *Edw.* 1 was then read; as were those of 32 *Edw.* 1 and 26 *Edw.* 1.

The plaintiff then put in an examined copy (b) of a grant to John of Eltham, 4 *Edw.* 3, of the earldom of Cornwall, and of lands in Suffolk, Norfolk and Lincoln, and of Berkhamstead, Herts, and of Chippenham (c), Wilts, and of 20*l.* rent (d) of the issues of the county of Cornwall.

*Joseph Newton*, a conventional tenant in Tywarnhale, stated the existence of several copper, and copper and tin mines in that manor, and that none of the adventurers had entered upon his tenement.

*Joseph Cocking*, a mine captain, proved that a conventional tenant in Calstock had successfully resisted the claims of the duchy lessees to work under his land until they had purchased leave to erect engines, &c.

*Stephen Pearce* proved the payment of 15*l.* to Paul, a conventional tenant, for injury done to his land by digging copper.

Answers of the jury of Stoke-Climsland to the Articles (e) ministered them 30 Oct. 1668.

“To the first article we say that the customary tenants of this manor do hold their customary lands and tenements to them their heirs and assigns for ever, according to the ancient customs of the said manor under several rents and fines certain, and according to certain ancient and laudable customs, suits and services used and accustomed within the said manor time out of mind, and for the more perfect re-

(a) From the Pipe Roll.

(b) From the Charter Roll, 1330.

(c) “Cyppenham” appears to have been the residence of this young prince. See Mann. Exch. Pract. 3d edit. 368, n. It had also been held by former Earls of Cornwall.

(d) The subsequent grant of the assessionable manors to this earl was produced by the defendant, (*ante*, 155.) In the interval between these two grants the manors were of course, within time of memory, severed from the earldom.

(e) See Articles, Appendix, I.

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membrance and knowledge who are tenants of the said customary lands and tenements, and what issues and profits might grow due to the lord of the said manor, out of and for the same, there hath been used and held by his majesty's noble progenitors once every seventh year, though with some intermission by reason of public troubles, or other accidents, one great court for the manor called the assession, by commissioners appointed and authorised thereunto, at which the old tenants that were recorded in the former assession have used to enter their names anew, and others which succeed by descent or by purchase and surrender have always been accepted, allowed and received for tenants; unto which records for further answer unto such articles we refer ourselves.

"To the ninth article we say that there are divers quarries of slate and hellingstone (a) in the said manor, of which, some have been opened anciently, and some of late times, but what profit hath been made of the same we know not, neither do we know that his majesty, or his predecessors, lords of the said manor, have had, or ought to have any profit or benefit thereof, for that the tenants have usually heretofore by their custom received and taken the profits of such quarries as are within their several tenements to their own use. And we further say, that there are divers tin works within the said manor which are enjoyed by the respective owners thereof under the stannary customs; but we know not that any profits do thereby arise or accrue to his majesty, other than the toll of tin. And we further say, that the tenants of the said manor have always claimed and used to have and take the benefit of the highways adjoining to their tenements respectively appertaining to the same (b),

(a) In the West of England, to "heal," means to cover, and a "hellier" is a tyler. And see Tooke, *ENYA etymology*, verbo "hill," &c. "Helling stones," *ante*, 202, (a), would be stones for roofing.

In the Nonnes Prestes Tale, "hillynge" is used by Chaucer in the sense of concealing. "Healer

of felons" occurs in Yelv. 153, Hob. 169, Noy, 133.

In German, the verb "*hehlen*" is now only used in the sense of concealing; and even in that secondary derivative signification it has in a great measure given way to its compound "*verhehlen*."

(b) *Vide Doe d. Pring v. Pearsey*, 7 B. & C. 304.

without ~~any~~<sup>the</sup> leave, and to their proper use, benefit, and behoof.

*John Hart Brimacombe*, steward to Sir William Pratt Call, Bart., proved that stone had been taken from two quarries on conventional tenements of Sir W. P. Call, in Stoke-Climsland, and that timber to the amount of 1000*l.*, had been cut and sold; and that he had prevented persons from working for copper on a conventional tenement called Byneleigh.

*John King Lethbridge*, steward of the manor of Stoke-Climsland, proved that the conventional tenants take stones and slate and timber without applying for licences; and that he holds the court-leet, which is also a court-baron, twice a year, and what is called the three week court, which ought to be held every three weeks. At each of those courts surrenders and admittances take place; of which copies, on *ad valorem* stamps, are delivered to the parties. Surrenders are not taken, nor are copies given out at the Assession Courts. On cross-examination, he proved the attendance of the conventional tenants at the Assession Court, and the mode of preparing the Assession Books (a), also a payment of 6*d.* and 1*s.* into the dish by the conventional tenants, which had been stated by the defendant's witnesses.

*Thomas Treverden* proved the payment of copper dues to Trehane, who was the owner of a conventional tenement 60 years ago. Only 80 tons were raised. Upon his cross-examination he stated that considerable damage was done to the surface, and that this payment of dues consisted in the payment, at two different times, of two sums of money, the amount of which was unknown to him.

*John Philip*, a conventional tenant of Stoke-Climsland, proved that he had obstructed two persons in mining under his duchy tenement, that he had sued them, and that the action had been compromised by the payment by the ad-

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venturers of 50*l.* and costs; and that J. W. Mearns, one of the duchy lessees, afterwards bought the estate for 2500*l.*, it having cost the witness 500*l.*

*Richard Retallick* stated that he was the son of a conventional tenant in Stoke-Climsland, who had made a set of a mine under his tenement to E. Nettell, 17 July, 1789.

*George Rose*, a miner, proved the payment of dues to John Retallick under this set.

*Thomas Bishop*, a conventional tenant, proved that he had forbidden persons to work for manganese, and had leased slate quarries on his estate.

*Thomas Brown*, a conventional tenant in Tintagel, proved the working of a slate quarry in his tenement for upwards of 20 years.

*William Simmonds* proved the working of a slate quarry in Tintagel about 30 years ago, under a lease from a conventional tenant.

*Edward Seccomb*, proved the taking of timber, slate and tin by the conventional tenants in Helston in Trigg, and the opposition of the tenants to the working of a lead mine by the duchy lessees ending in the abandonment of the mine, which, however, was not worth working.

*Edward Netherell* had been forbidden by Dr. Marshall, a conventional tenant of Helston in Trigg, (Camelford,) to mine under his tenement in 1806. He then worked in Tintagel for manganese, in the conventional tenement of Miss Smith, who stopped up the mine.

*Nicholas Bennett*, Esq. deputy recorder (a) of Saltash, rented, under Burt, a conventional tenement in Trematon. Burt, and his son after him, cut and sold many hundreds of timber trees. Houses were built in Saltash (b) with stones raised from another conventional tenement.

*William Bennett*, deputy reeve of the manor of Trematon, proved the working of a slate quarry upon a conventional tenement in Trematon.

*William Spurway* rented a conventional tenement in

(a) Appointed by Sir Anthony Buller. (b) *Ante*, 141, (a).

the manor of Liskeard, of Mr. Edye, in which he worked a stone quarry.

*James Donnithorne* proved the cutting down of timber and opening of quarries in duchy land.

*Charles Scott* stated that he was steward of the manor of Tywarnhayle-Tyas until last year; which manor was held by Sir William Curtis, and others, under an alienation in the time of *Edw I.*, to one Tyas (*a*).

The Court here suggested, that unless this were part of the assessionable manor, nothing done there could be material (*b*).

*Thomas Drew*, and his son *John Drew*, proved the working of a stone quarry in Mr. Sawle's tenement in Tewington.

*John Boughtley*, wheelwright at St. Austel, proved a purchase of timber 20 years ago, from Mr. Carthew's Nansmellyn, sold by public auction.

*Thomas Oliver* proved the cutting down of timber from Nansmellyn.

*Robert Libby* proved the sale and carrying away of timber at St. Austel, in 1810.

*John Muckford* proved that Lamellyn Moor is enclosed, and that Lamellyn is a bounded estate.

*Thomas Trevithick* proved the apportionment of the tin dues upon stream works, and that the sum received for tin dues for Merthyn was kept in a chest by itself, separate from that arising from Mr. Carthew's land.

"Articles of agreement (*c*) had, made and concluded upon the 8th day of May, 1716, between Stephen Robins (*d*) of St. Columb in the county of Cornwall, of the one part, and Peter Couch and John Rowett of the other part, were then put in, whereby the said Stephen Robins, in consideration

(*a*) *Ante*, 144, (*a*).

(*b*) This manor appears to have formed part of the assessionable manor of Tywarnhaile, within legal memory, *ante*, 141. And see *Calend. Inquis. post Mortem*, 1 vol. 229, 301, 2 vol. 3; *Testa de Nevill*, 201, b.; *Calend. Rot. Pat.* 315.

(*c*) From the muniments of Mr. Carthew.

(*d*) It was here suggested by the defendant's counsel, that Robins, not being the owner of Nansmellyn, must have made this set as a bounder. *See vide post*, 296.

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of a full fifth part, toll, or dish, and other clauses, conditions, covenants and agreements, granted to set, and to farm let, free liberty to work, aid and search for tin in certain fields and closes of land, situated in the village and fields of Lamellyn, commonly known by the name of Lamellyn Moor, &c."

*James Buckton* stated that in 1823 he applied to the duchy office on behalf of Rowe, and afterwards of Carthew, to see the rolls of the manor of Tewington, and subsequently the assession rolls as well as the rolls of the manor of Tewington, and that inspection was refused.

Lord TENTERDEN, C. J.—The parties had the remedy in their own hands, by application for a *mandamus*.

An instrument was produced, purporting to be a deed of trust, shewing that Hugh Williams was a trustee of Lamellyn, that Robins was the beneficial owner, and Williams was to be admitted for him.

A copy of a surrender and admittance, purporting to be signed by the steward, and coming out of the hands of the customary tenant, is admissible in evidence, without producing the court roll.

The plaintiff then produced a surrender of 1743, from Honor Williams to Jane Carthew (*a*).

Sir J. Scarlett. The surrender ought to be upon the roll. That is an admittance.

*Brougham*. It is a copy in the regular form, just as the others were; it is at a special court.

*Wetherell*, A. G. This document is clearly inconsistent with the title upon the roll. I shall object to it upon other grounds, the roll is better evidence than this, if this is a copy of the roll.

*Brougham*. There cannot be better evidence against the lord than the copy the steward gives out.

Lord TENTERDEN, C. J.—I think it may be read.

Here the case closed on the part of the plaintiff.

(*a*) From Mr. Carthew's muniments.

The Attorney General then proposed, on the part of the defendant, to put in old court rolls of the reign of *Henry VIII.*, and some other documents relating to Nansmellyn.

The plaintiff's counsel objected that this evidence ought to have been put in before, and was not to be received at this period of the cause. But the Court held, that as the plaintiff had produced surrenders in modern court rolls, it was competent to the defendant to give evidence of other surrenders of an earlier date.

Sir *J. Scarlett*. If Mr. Brougham had begun in the usual way, and produced his evidence, we should have given it before.

Lord TENTERDEN, C. J.—We are all satisfied that the Attorney General has a right to do it.

Mr. *Charles Devon* proved a search (*a*) for the ancient court rolls of the manor of Tewington, and that the earliest found were of the 32 *Hen.* 8.

A copy, examined by the witness, of a court roll is admissible in evidence, without the production of the original.

*Erskine*. Have you the originals?

Lord TENTERDEN, C. J.—An examined copy is evidence.

“ Law court holden there in the 32d year of King *Henry* the 8th.

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Tewington.

Homage.

Amerciament, *6d.*

“ They there present Thomas Saunder, John Saunder the elder, and John Saunder the younger, who have dug and subverted the arable land and several soil of the lord the king at Lamellyn within, &c. without licence, contrary to the liberties of the manor there, and contrary to the custom of the stannaries of Blackmore, &c. Therefore in mercy &c.”

(*a*) In the Augmentation Office.

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*Brougham.* This is not a surrender.

Lord TENTERDEN, C. J.—I think you cannot now give this part of the court rolls in evidence; it should have been read before; you must now confine yourselves to the surrenders.

“ Court holden there the 1st day of Sept. in the year aforesaid. At this court came John Braye the younger and surrendered into the hands of the lord one tenure in Castell Gothowe with the appurtenances, to the use of Benedict Nancolas; to have and to hold to him and to his heirs *of gift*, according to the custom of the manor aforesaid. And the said Benedict Nancolas came at this court, and took the aforesaid tenure with its appurtenances in Castell Gothowe aforesaid, to have and to hold to him, according to the custom of the manor aforesaid, *unto the next assession*; and did fealty to the lord, and gives for recognition eight-pence.”

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“ Extract of all fines, issues and amerciaments, and other profits coming and renewing by all courts holden within the manor aforesaid, from the 26th day of March, in the 16th year of the reign of *James*, now King of England, unto the Feast of St. Michael the Archangel, next following 1618. At a court of the manor aforesaid, holden at St. Austell, within the manor aforesaid, the 30th day of April, in the 16th year of the reign of the Lord *James*, now King of England, &c. is inrolled thus :—At this court came Luke Evans, and surrendered into the hands of the Lord Prince Charles one close of land there, containing by estimation, two acres and five perches (anglicè, two

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land yards) either more or less, called Tre-neare, lying and being within the manor aforesaid, to the behoof and use of Tristram Carlyon of St. Austell aforesaid, his heirs and assigns, according to the custom of the manor aforesaid; and thereupon at the same court came the aforesaid Tristram Carlyon, and took of the said lord the prince, by Thomas Tubbe, steward of the manor aforesaid; to have and to hold to the said Tristram Carlyon, the aforesaid close containing two acres and five perches of land according to the custom of the manor aforesaid; And the aforesaid steward gave him seisin by the rod; And the aforesaid Tristram Carlyon gives for his entry twenty pence to the lord the prince for fine; and his sureties are Walter Higman and John Davey; and so he did fealty to the said lord, and is admitted tenant thereof."

ine, 20d.

" Court holden at St. Austel, the 30th day of December, the 20th year of the reign of King *James*, &c.

surrender.

" At this court came Thomas Trelowthes, gentleman, one of the customary tenants of this manor, and surrendered into the hands of the illustrious Lord Charles, Prince of Wales, Duke of Cornwall and York, and Earl of Chester, &c., lord of this manor, all one quarry in Trenyaren, within the manor aforesaid, extending from the great quarry there on the south, to a certain place called Blackhead, containing in length about 100 rods of land and as much in breadth, and on the north part of the same great quarry to a certain place called Quendrin, containing in length and breadth about the quantity aforesaid, (which the said Thomas Trelowthes took by virtue of the warrant of the commis-

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sioners of the revenues of the said lord the Prince, bearing date the 19th of March, 1620, and inrolled before the auditor of the duchy of Cornwall,) upon condition that Richard Scobel may have the said quarry until the next assession by the annual rent of 20s. and other services therefore before due."

BAYLEY, J.—That seems as if it was a new taking.

*Coleridge.* The services are those that are before due.

Memorandum, that Mr. Hockmore and Mr. Roscarrachedid, by order of the Gable, set down and order between Trelowthes and Mr. Saule, concerning this quarry, according to which the surrender to be rectified at the next assession.

" And thereupon at the same court came the said Richard Scobel, and took of the said lord the Prince, by livery of the steward of the said manor, the said quarry extending as above, (saving the right of and in the Great quarry); To have and to hold the aforesaid premises to him the said Richard Scobel *until the next assession*, by the said rent of 20s. and other services therefore before due; and he giveth for a fine nothing; and did his fealty to the lord only; and so he is admitted tenant thereof by surety of John Davye and Richard Pearce."

A surrender by Ellen Carlyon of a tenement in Trenyaren, 6th Oct. 5 *Car.* 1, was then read.

A surrender by Oliver Julyan of the Crosse Park, parcel of his tenement in Trenyaren, 6th July, 5 *Car.* 1, and by William Peirse of half a messuage, &c. in Trenyaren, 13 *Car.* 2, were read. This omits the word "heirs" in the habendum.

A surrender by Lucas Julyan of lands in Trenyaren, 23 *Car.* 2, was read, in which "heirs" are omitted.

The admittance of John Bonney, in 1663, was then produced.

*Coleridge* then proposed to read from the same the presentments of the homage respecting the taking of timber by the conventional tenants.

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*Brougham* objected that this document should have been read before, and that the defendant was not now entitled to go into evidence to answer generally the case of the plaintiff. The plaintiff rests his case upon possession, not title; he relies upon his possession as sufficient to support the action; then the defendant sets up a case of title in another party; the plaintiff, in his answer to this, does not abandon his original case of possession and assert title in himself, but merely denies the title under which the defendant claims. It is quite immaterial whether the plaintiff have title or not; it is sufficient for him to disprove that which is set up by the defendant. The evidence therefore now tendered for the purpose of negating the rights of the conventional tenants is wholly irrelevant to the issue taken in the cause.

Lord TENTERDEN, C. J.—If a plaintiff first relies upon his possession, then calls upon the other side to shew title, and afterwards goes into evidence to shew his own title, must we not allow the defendant to go into evidence to rebut that? I am clearly of opinion, after the course which the cause has taken, that justice cannot be done if such evidence be rejected.

*Brougham*. We first rely upon our possession as sufficient to support the action, then my learned friends are to take it out of us to claim it for another party; our evidence in reply is not to re-vest it in us. We rely not upon title but possession; we will take the title they have, and vest it any where else; it does not signify where, provided we divest them.

BAYLEY, J.—The plaintiff may be considered as admitting that the fee simple and the general property in the land

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is in the Duke; but then the plaintiff says he has a certain peculiar interest in the land, and the power of exercising certain rights upon the land. If in the defendant's case they had gone into evidence to negative the existence of those rights, possibly they would not be at liberty to give further evidence on that point now, but if they did not do it then, they are entitled to do it now. The plaintiff's case has been to shew that these tenants had the right to dig stone and cut timber and work mines; surely the defendant must be at liberty, in order to prove that they had not such a right, to shew instances in which it has been successfully resisted.

Lord TENTERDEN, C. J.—Or how it commenced.

Extracts of Presentments 2 *James* I. (1604) were then read:—

Presentment, 3s. 2d.	“To wit, of John Killyowe, gentleman, for divers defaults this year, because he hath permitted his house here at Lamellyn within, &c. to be entirely ruinous, and came not to answer, &c. Of Richard Oppye, for divers
Default, 2d.	defaults this year, because he hath allowed his house at Towan to be ruinous in default of repair, and hath not entered in the same Court. Therefore in mercy as, &c. Of Luke Goziard, one of the customary tenants
Default, 3s. 4d.	of this manor, because he hath not this year repaired his dwellinghouse and his fences at Trenyaran, at the feast of St. John the Baptist last past, given him by the Court aforesaid, but hath made default.”

Entries in court rolls of amerciaments imposed, not evidence without proof of payment.

Lord TENTERDEN, C. J.—Amerciaments, unless you shew them paid, are not in general evidence.

“ 13 *James* I. At a Court of the aforesaid manor, held at

St. Austell, the 8th day of January, in the year of the reign of our Lord *James*, by the Grace of God, of England, France, Ireland, King, defender of the faith, the 13th, and of Scotland the 49th. At this Court, two elms, upon the petition of John Killyowe, gentleman, are granted to him for the repairs of his tenement in Lamellyn, parcel &c. by livery of the reeve, and John Daddoe, Thomas Betty and Stephen Jacob, to whom it is commanded . . . . . (a) defaults of reparation; and one elm is granted to Richard Julyan for the repairs of his tenement in Pencarroe, by livery of the reeve, William Higman, John Davy and Richard Daddoe, to whom it is commanded as above."

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Lord TENTERDEN, C. J.—Where the elms came from does not appear. The reeves select them for them.

The witness, Mr. *Devon*, being asked whether he had inspected many of these rolls, stated that he had looked through about 300 altogether, in Tewington.

A witness who produces a document for the purpose of shewing a particular clause, may be asked whether he has not inspected documents of the same nature, in which the clause is not found, although such documents are not produced (b).

*Brougham*. In the whole of those, do you find "from seven years to seven years," or "till the next assession" in any other except the two instances you have read?

Sir *J. Scarlett*. That is a short way of giving your evidence.

*Brougham*. It is to save the necessity of producing them.

Lord TENTERDEN, C. J.—I think you may ask that question.

The witness then stated that he did not think there were any rolls containing these clauses, except the two produced.

(a) Here some words are illegible. v. *Dixon*, Peake, N. P. C., 83; *Spencer v. Billing*, 3 Campb.

(b) And see *ante*, 212; *Roberts* 310.

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*Wetherell, A. G.* They pretended to say that Holmbush was a part where we had no right to take the copper. We now put in sets of those very places.

Some (a) sets were delivered in.

*Brougham.* They might have given this evidence in the first instance.

Lord TENTERDEN, C. J.—How could they tell that you would give any specific evidence against Holmbush. They meet it now. Do you propose to read these sets?

*Brougham.* We admit that the duchy lessees have made sets, notwithstanding which they were obstructed in the way we have mentioned.

Two sets of Holmbush mine from Sir William Lemon, in 1808, were then put in.

One Veal, being called by the defendants, proved that valuable ore had been taken by the duchy lessees, dug in Holmbush mine under the conventionary land in Stoke-Climsland, belonging to Mrs. Shear, who, after resisting the claim of the duchy lessees, had finally acquiesced in it.

Here the defendant's evidence in reply closed.

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#### SEVENTH DAY (b).

At the sitting of the Court Lord *Tenterden*, C. J. called upon the Attorney General to go on.

Where in an action between subjects, the Crown interfered *pro interesse suo*, and undertook the defence of the

*Wetherell, A. G.*, contended that representing the Crown, he had a right to the general reply after the plaintiff's counsel should have been heard.

(a) *Ante*, 269.

(b) Wednesday, 20th November, 1828.

*Brougham*, contrà. In a cause carried on by the Crown, if the two circumstances concur of the Crown's being the party on the record, and being the substantial prosecutor, it is as if the Attorney General had filed an *ex officio* information, and he has the right of reply whether the defendants call witnesses or not; but here the Attorney General does not appear on the record. The rule for a trial at bar (a) was obtained upon a parol statement, without anything being averred on the record (b).

Lord TENTERDEN, C. J.—In a civil action the Crown cannot be a defendant (c).

BAYLEY, J.—The King cannot be conusor in a fine (d).

(a) *Ante*, 133, 134.

(b) *Sed vide ante*, 135, (b).

(c) At common law, the only mode of proceeding against the Crown is by petition of right, in which the actor is called the "suppliant." By statute, the subject may sue the Crown by *monstrance de droit* or by traverse of office, according to the nature of the claim. In these proceedings, the claimant is a "plaintiff;" but it is not usual to style the king "defendant," though he is in the situation of a defendant, and may plead in abatement, &c. Mann. Exch. Pract. 2d edit. 87, 107.

(d) A fine by the king is by way of render, not by an immediate writ of covenant. Cro. Car. 96, 97. And see Com. Dig. *Fine*, C.

(e) *Vide* Mann. Exch. Pract., Book III. Ch. 1, sect. 17, § 2, as to the removal of causes from other courts into the Exchequer, "where the matter of the suit touches the profit of the king." 2d edit. 193.

In the case of *Lamb v. Gunman*,

Parker, 143, the Court removed the cause "upon reading the pleadings." *Hammond's* case, Hardres, 106, there referred to, was an ejectment; but as the lessor of the plaintiff had also traversed an inquisition upon the same subject-matter, the Barons proceeded upon that record in their own Court. In *Bereholt v. Candy*, Bunb. 34, pl. 52, the action is stated to have been removed on motion, because an information was actually filed for the copper in respect of the seizure of which the action was brought. It is not stated on what materials the application was founded, but it appears to have been opposed; and it is probable that the Court was moved upon affidavit in the ordinary course. In *Perry v. Bailey*, Bunb. 309, pl. 392, the application for the removal of the cause into the Exchequer is expressly stated to have been made on affidavit. So in — v. —, 1 Anstruther, 239, and in *Kingsman*, *in re*, 1 Price, 206.

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cause, and witnesses were called on both sides, the plaintiff was allowed the general reply (e).

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Sir *J. Scarlett*. In cases where the civil rights of the Crown are concerned, and the issue is upon the defendant, the Attorney General has the right of reply.

*Wetherell, A. G.* This is a proceeding in the nature of an information in the Exchequer. It is substantially the same thing as if the King were a party on the record.

Lord TENTERDEN, C. J.—No instance being shewn in which the Attorney General has, in a case like the present, had the reply, we think it safer not to extend the rule, but to allow the cause to take its ordinary course.

*Wetherell, A. G.*, then addressed the jury upon the plaintiff's evidence, in reply. The copper in question was raised from under a *conventional* tenement. The precise nature of that tenure it will be unnecessary to define; it is sufficient that it is not a freehold. We have shewn that this same identical tenement of Nansmellyn, (a portion of which was possessed by the testator, by the same names, nay, by the same parcels, with the same incidents, with the same characters and quality belonging to it as are recorded in those most authentic documents, the assession rolls and the caption of seisin,) was, in 1774, surrendered by a person of the name of Symons, who, upon that only authentic record by which the holdings of the manor are preserved and declared, namely, the roll of the Assession Court, acknowledges that he took it with the same incidents as were the incidents 500 years before. The plaintiff's counsel begin by stating that they know nothing of the Assession Court, nothing of this conventional land; till at last, by their own witnesses, we find that this conventional land is as well known as a field of oats in Hertfordshire is known from a field of beans. "Duchy land" or "not duchy land," is a distinction perfectly well known in

Cornwall(a). The value of the evidence respecting these tenures, supplied by the assession rolls, has been denied. It has been represented that these are documents in which the servants of the crown or the duchy might write any thing they chose, without the control or interference of the tenants; that these rolls are therefore of no authority to shew the rights and interests of the latter, and that there are in existence other documents relating to these tenures, by which their nature and incidents are to be more satisfactorily ascertained. But the mode of holding the assession courts, their publicity and notoriety, and the attendance of the officers and tenants in great numbers upon them, has been proved not only by the defendant's witnesses, but by those called on the part of the plaintiff. At this court, Symons, under whom the plaintiff claims, admits that he holds Nansmellyn from seven years to seven years, to him and his heirs, according to the custom of the manor. That custom is clearly stated in the parliamentary survey(b); in accordance with which I admitted, as I was bound to do, that the tenants had an indisputable, indefeasible right of renewal—a right to renew their leasehold from seven years to seven years. But a man may have a perpetual right to renew an estate, and yet if the renewal be of an estate for seven years, it is nothing more than a perpetual right to renew that which is intrinsically a leasehold. The right to renew cannot in any manner alter the nature of the tenure. This tenure, particularly anomalous in its nature, is, beyond all doubt, not a freehold tenure. In some parts of Ireland tenants have covenants from their landlords to renew from 21 years to 21 years, as long

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(a) The distinction in Cornwall is current and well-known, not between duchy land and land which is not duchy, but between "conventional duchy" and "free duchy;" the former term being applied to that peculiar customary tenure which forms the subject of inquiry in this action; the latter,

to freehold at common law, held of a duchy manor, but not within, or parcel of, the manor, though within its ambit.

The term "fee land," adopted by some of the witnesses upon its being put into their mouths by counsel, is unknown in Cornwall.

(b) *Ante*, 173.



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as the world may last; but this could never be considered as constituting a freehold interest. In order to shew that the property in the minerals is not in the conventional tenant, the defendant has proved, with respect to tin, that in all ages toll of tin has been paid to the Duke of Cornwall. This part of the case, indeed, seems hardly to have been disputed on the other side. With respect to copper, a series of leases from 1698, soon after the period of the discovery of that mineral in this country, to the present time, has been produced; and also a document which appears to me to be of essential importance, the Exchequer proceedings in 1762, which were instituted in consequence of an interruption of the lessee by some persons who claimed the copper, and the lease was suspended until that question was decided. [Lord *Tenterden*, C. J. The lease was not suspended, it was left in abeyance; it was deposited, and to be returned.] My own judgment was more affected by this evidence than by any of the other documents which have been produced. It must have been notorious throughout Cornwall that such proceedings had been taken; yet men of large substance, owners of conventional tenements, have acquiesced without litigation, the Duke of Cornwall and his lessees receiving large dues of copper from numerous mines worked within the county, from 1762 down to the time when the plaintiff's testator thought fit to commence his action. A man may undoubtedly litigate a right which has been acquiesced in for a century; he may have brought something to light which no one discovered before. But nothing of this kind has been shewn by the plaintiff in this case. This would be a strange unintelligible tenure, if the tenant, having no right to take tin, the probable produce (a) of Cornwall, might nevertheless take copper. The owner of a conventional tenement has no right to take from the underground profits of the soil the smallest particle of tin,

(a) *Query*, Whether this very probability, coupled with its value, may not have occasioned a royal appropriation of tin.

and yet this most strange and singular right is of this description, that although the King, or the Duke, as lord, takes all the tin, he has not a right to one ounce of copper.

Evidence has certainly been produced to shew instances in which the lessees of copper were interrupted; but these supposed interruptions, when examined, are all referable to some other cause; and not a single instance has been adduced in which a conventional tenant, claiming the minerals by reason of his tenure, has received to his own use the profits of a copper mine opened in his tenement. With respect to the taking of slates, stone, and timber, the observation of Cowper, C. in *Bishop of Winchester v. Knight* (a), applies, that a right to commit a particular species of waste, which the tenant may have by grant, is not evidence of a power to commit waste of a different species (b); though a custom authorising the tenants to dispose of one sort of mineral, as coal, may be evidence to support a right to dispose of another mineral, as lead. The supposed right to the timber, however, has been shewn to be the result of gradual encroachments upon the lord. With respect to the court rolls, the defendant says, and he has abundantly proved it, that there exists but one authoritative court for the constitution of rolls embracing the surrenders and grants, and exhibiting the legal features of the tenure, at which all the tenants were bound to attend. This was the Court of Assession, shewn to exist for five centuries. It is to the rolls of that court that we must resort for legal evidence of what the lord granted and the tenant took. For this position abundant evidence has been produced; and it is supported by the testimony from the other side, namely, the parliamentary survey and the court rolls; in which it is said that the estate is granted to the party and his heirs, *according to the custom of the manor*. I have proved that these court rolls are private minutes kept by the stewards in the country during the intervals between the septennial assessions; not, properly speaking, court rolls, but private memoranda kept by the steward for

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(a) 1 P. Wms. 406.

(b) *Vide post*, 333, (a).

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his own guidance, and the information of the commissioners at the next assession. This practice is continued down to the present moment. From these interlocutory memoranda accounts are made out of the alienations, &c., which at the next assession court are carried to this assession roll, which is then the only document authenticating the lease from the lord to the tenant. The proceedings at the intervening courts are shewn to have been extremely loose and irregular; sometimes the surrender is made to the deputy steward at a special court which the steward convenes, consisting of only two tenants; that is clearly not the form of a court of law. Sometimes these presentments are made at a court-leet, which is a court of criminal jurisdiction, and where they are as much out of place as a surrender of a copyhold would be at the Old Bailey. In fact, these proceedings went on for the convenience of the tenants in the absence of the superior officers of the duchy, and had none of the authenticity belonging to court-rolls.

It is quite obvious, from the perusal of the *inquisitio post mortem comitis Edmundi* in 1301 (a), and the caption of *seisin* in 1337 (b), that these curious documents were compiled after the most elaborate researches. In those early periods the tenants of the manor were divided into free tenants, conventional tenants, and villeins of stock. It is contended, however, that the conventional tenants must have been freeholders in still remoter times, because the sheriff of Cornwall appears, in the early documents produced by the plaintiff, to have accounted for their rents, together with those of the free tenants, and to have denominated both rents of assize. But I answer, that the sheriff of Cornwall returned one gross sum, and it was no part of his duty to enter into the names and tenures of those who paid it. He is appointed to receive so much money, and does receive it; but when we come in later times to a document, the precise object of which is to give the particulars of each description of tenants, we find how much belongs to one class and how much to another. If the reeve or sheriff returns into the Exchequer a certain sum as rents of assize,

(a) *Ante*, 141, 150.

(b) *Ante*, 156, 159.

specifying no tenants and giving no particulars, it cannot be inferred that these rents of assize were paid by the conventional tenants, merely because we find that a few years afterwards the total sum received from the free conventional tenants is nearly of the same amount. But I contend that the correspondence of the sums, instead of furnishing an argument that before these returns were made there were rents of assize to this amount, turns the presumption just the other way. If, a few years before, we find 24*l.* due, and in the succeeding documents we have the separation of that sum into two component parts, one part allotted to the free tenants and the rest to the conventional, this demonstrates, that when the total is described under the name of rents of assize, it is merely a general name given to it by the reeve handing it over to the sheriff, whose duty it was to pay it into the Exchequer.

After the labour and research which this case has undergone, and without which it could not have been understood, it is satisfactory to find that the effect and result of that labour has been to reduce it to one of perfect demonstration; it does not depend merely upon dry legal rules, or the nice standard of legal evidence, but upon those unerring principles, those internal monitions which are the comfortable sources of conviction, and which juries and others who are concerned in the administration of justice may act upon with confidence and satisfaction.

*Brougham*, in general reply. The question being who has a right to the minerals in these conventional tenements, the defendant has attempted to show that the tenants cannot have that right, because they do not hold for an estate to which the law annexes the enjoyment of underground profits. It is, therefore, material that I should satisfy you, from the evidence in the cause, that there are clear and unequivocal indications of that kind of interest in the soil, to which the law will annex the enjoyment of those underground profits. The attorney-general says, that we produce the sheriffs' returns, and rely upon them;

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but that whatever the sheriff may have returned signifies nothing, because it was no business of his to enter into the particulars of the sources from which the revenue coming to his hands was originally derived, or to ascertain the tenure of those by whom the profits were returned into his hands. That is not so. All the documents upon which I rely, or some of them, come from the Pipe-roll, and are not sheriffs' accounts, but receivers' accounts. Ocham's account is headed thus: "*Compotus Thomæ de Ocham receptoris,*" "*tempore de la Hyde, senescalli:*" that is to say, Ocham (*a*), the receiver of the duchy rents, here renders an account, referring to a list of particulars accompanying that account, stating that he, Ocham, either receives it himself and sends it in his own person, or that he has it from De la Hyde, the steward; but from one or other, or both of these officers, acting on behalf of the Duke of Cornwall, the account immediately proceeds. I also rely upon accounts, which do not come from the Pipe Roll, prior to these accounts; and, thirdly, upon the accounts rendered by the reeves and others in great detail. The attorney-general admits, that if the free conventional tenants are proved to have paid rents of assize during all the time you have any accounts of payments at all, they will be shewn to have paid rents incident to freehold, or usually so considered. I will not go so far as that, but I believe they are inconsistent with leasehold. Lord Coke says (*b*), "*Rents of assize are the certain rents of the freeholders and ancient copyholders, because they be assized and certain, and doth distinguish the same from redditus mobiles, farm rents for life, for years, or at will, which are variable and uncertain.*" Consequently we may take it in the outset, that rents of assize are wholly inconsistent with a leasehold estate, with a tenancy from seven years to seven years. But then it is maintained on the other side that these rents of assize are not paid by conventional tenants. In the caption of seisin, 1337, you have rents of free tenants 7*l.* 18*s.* 2½*d.*, tin fine

(*a*) 2 Inst. 19. The Ocham made a Baron of the Exchequer in there mentioned by Lord Coke was 1317.  
 probably John de Okeham, who was (*b*) Ibid.

of the same 14s. 2½d., rents of conventionaries, free and native, 22l. 4s. 0½d.; and then fine of tin of free and native conventionaries 20s., and toll tin 6s. Going back to the extent of 1 *Edw.* 3, (1327,) you will find the rents of free tenants 7l. 16s. 1½d., fine of tin 18s. 3½d., a little different from the former; free conventional tenants 16l. 4s. 0¾d., native conventional tenants 4l. 0s. 3d. making the whole conventionaries 20l. 4s. 3¾d., the fine of tin 20s., and toll of tin 6s. In 17 *Edw.* 2, you have the rent of assize. Here they are not distinguished into free and conventional, they are taken all together, 25l. 3s. 8½d., fine of tin 20s., toll tin 3s. You have then an account of half a year, from Michaelmas to Lady-day, in the 10 *Edw.* 2, in which there is no distinction made between the free and conventional tenants, in which you have the sum of 12l. 11s. 10½d., making for the year 25l. 3s. 9d. Then there is an account from De la Hyde, the steward, 6 *Edw.* 2, one quarter's rent of assize, without distinguishing from whom, 6l. 5s. 11d., which makes for the whole year 25l. 3s. 8d., very nearly the same sum as before; and 29 *Ed.* 1, and 30 *Ed.* 1, the same sum of 25l. 3s. 8d. Then, 26 *Edw.* 1, (and this is Ocham's second account,) rents of assize 25l. 3s. 3½d., and in Ocham's first account, 25 *Edw.* 1, (the earliest period to which these accounts reach,) you have rents of assize 25l. 3s. 2½d. It may be taken as the result of these ancient documents, that during a very long period of time, from the Caption of Seisin back to 1296, the same sum was constantly returned, or within a fraction of the same sum, under the head of rents of assize. That these "rents of assize" included the conventional tenants as well as the free tenants, I show in the first place thus: in the 10 *Edw.* 2, one of those to which I have referred, it is a gross sum of 12l. 11s. 10½d., being for two quarters, answering to 25l. 3s. 9d. for the whole year, and there is no distinction as to the kind of tenant. There are rents of assize of free tenants and others, 12l. 11s. 10½d., which shews that it was not confined to the free tenants; and in the next place, the caption of seisin, and all the accounts which expressly distinguish the free tenants, mention about

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the same sum as the amount of their rents, either 7*l.* 18*s.* 2½*d.* or 7*l.* 15*s.* 8½*d.*, or 7*l.* 18*s.* 9*d.*, and sometimes 7*l.* 18*s.* 9½*d.*; and in the case in the 39 of *Eliz.* giving very nearly the same amount, with a difference I shall presently take notice of; but universally, when they are specified as the rents of assize of free tenants, they are stated to be between seven and eight pounds, and no more; and consequently where I find in a document, that in some years rents are denominated "rents of assize," without specifying what they are or whence they proceed, but merely that there is a gross sum of 25*l.* 3*s.* 9*d.* or 25*l.* 3*s.* 2½*d.*, I have a right to say, that in those years the sum is made up by the rents of the free and conventionary tenants together. In the third place, the inquisition at the death of Earl Edmund distinguishes the rent thus: "43 conventionary tenants, who render, for rent, works, and fines of tin, 13*l.* 11*s.* 2*d.*; 11 villeins, who render 4*l.* 1*s.* 10*d.*; 18 free tenants, (admitted to be freeholders to all intents and purposes,) who render for rent and the wastes 8*l.* 9*s.* 4½*d.*" Sum all three together, and you have 26*l.* 2*s.* 4½*d.* for the whole; and with this difference, that whereas in the former account, you have not nearly the same sum, I shall shew you quite the same sum. This 26*l.* 2*s.* 4½*d.* includes the Stannary fine, (*i. e.* fine of tin,) which is 1*l.*; and deducting that, you have 25*l.* 2*s.* 4½*d.*, which is the gross sum returned in all these accounts, where they do not distinguish the conventionary payments from payments by the free tenants. In the fourth place, I shew that these rents of assize are paid by the conventionaries; for where the free tenants are said to pay 7*l.* 16*s.* 4½*d.*, the free conventionaries are said to pay 16*l.* 4*s.* 3½*d.*, and the native conventionaries 4*l.* 0*s.* 3*d.* It stands, therefore, clearly demonstrated, that rents of assize are paid, and have been paid, as far as these accounts reach, under the name of rents of assize, entered by the duke's own officer, and returned to the duke's own repositories as "rents of assize" paid by the conventionary tenants. It is remarkable also, that the amount of the free conventionary rents, whether they are taken together and

called "rents of assize," or are entered under separate heads, is nearly the same sum through the whole period of time which is covered by the documents. But suppose there was a variation in the rents of the conventional tenants, have not the rents of the free tenants varied also? most undeniably they have; at one time 7*l.* 18*s.* 2*d.*, at another time only 7*l.* 15*s.*, at another time 7*l.* 15*s.* 7*d.*, and in the 39 and 40 *Eliz.* 8*l.* 0*s.* 1½*d.*; so that there is a variation under the head of what cannot be disputed to be a quit rent, a rent paid by the freeholder, notwithstanding he has as good a freehold as it is possible for a man to have; so that any variation to the amount of a pound or two, even if it could not be accounted for, in the rents of assize paid by the conventional tenants, no more proves them not to be rents of assize, the fixed rents which Lord Coke describes, and which the attorney-general admits to be inconsistent with leasehold tenure, than a variation in the rents of the freeholders themselves can prove that they have not a freehold interest in their land. There is no material difference in the nature of the rent, whether you call it "rent of assize," or "quit rent," or "conventional rent," a name by which it is very studiously called in the assession books and in the reeves' accounts, from the time when these plans of usurpation against the tenants were formed. Though the heading is different, the thing remains the same; the rent does not vary during the course of these five or six centuries for which those rents have constantly been received. Can any man believe that if this tenure were leasehold, if the Duke of Cornwall had the right, as it is now pretended, to turn out these tenants at the end of seven years, these rents would never have varied? Can any man suppose that he would have continued satisfied with the same sum for all the sorts of estates combined within it, and protected by that payment, reign after reign, down to the present day, when the value of money was decreasing thirty and forty fold, when every other rent was raised, when there is not in the whole county an acre

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of ground which does not yield twenty, forty, or fifty fold more than it did in the time of *Edward* the Third; and yet the Duke of Cornwall continues to receive, for century after century, without any material variation, the same rent for these estates which was paid in the reign of that king. I therefore take it that, consistently with the legal nature of rents of assize, as admitted by my learned friend and laid down by Lord Coke, and with the fact that these rents have continued fixed and have never been materially raised, this never could have been at any time a mere leasehold tenure.

The tin fine is extremely material in this case. Every *fixed* payment rendered by the conventional tenants shews more strongly that they do not hold like leaseholders. In this respect the manor of Tewington is distinguished from all the rest by the payment of a fine for tin. At whatever time this first arose, whether by grant or otherwise, when the tin fine, which never appears to have varied, was reserved, it is exceedingly probable that it was a consideration to the duke from the tenants for the underground profits. The payment of this fine is always described by the term "render;" the tenants are said to "render by the year for the fine of tin;" the individual conventional tenant is clearly not stated to pay so many pence; but in that important document, the caption of seisin, so much relied on by the attorney-general, each conventional tenant, one after the other, is said *to render by the year a fine of tin*. [*Bayley, J.* The caption of seisin (*a*), in the 11 *Edw. 3*, mentions fine of tin of free and native conventionaries as worth by the year 20s.] It first states what each conventional tenant renders, and then in another part of the document the whole is stated to be worth 20s. This differs from the fines of the free tenants, who are said to pay so many pence. No doubt a very important change appears to have taken place early in the reign of *Edw. 3*, with respect to the Duchy of Cornwall. A court appears to have arisen

(a) *Ante*, 156, 159.

called the Assession Court, as evidenced by the Assession Roll of the 7 *Edw.* 3. At this time then this great change appears to have been effected in this manor, that from seven years to seven years an assession court was holden, of which we have not the slightest trace prior to 7 *Edw.* 3, (a) unless that in the roll of that year, or rather in the commission under which that court appears to have been held, a reference is made to the holding of one in the sixth year; and therefore it may be assumed that the first holding of that court and the first assession took place, not in the seventh, but in the sixth year of that king. Undoubtedly those were times when you might have expected some violent changes to take place, some extravagant attempts to be made upon the property of individuals; and when I remind you of an extraordinary coincidence between the dates of the time of the origin of these assession courts and commissions, and the new mode of entries there adopted, and the claims there for the first time set up to consider these holdings as leaseholdings, and the events which disfigure the last year of *Edward* the Second, and the first year of *Edward* the Third, his son, you will agree with me in thinking that it is just of all the periods of the history of Cornwall or of England, the very year when some such violent usurpation might have been expected to have taken place. Isabel was then the grantee of the duchy, and it was for her interest and under her commission that this first extent was taken. She was a person who had invaded the country and promoted a rebellion in it; she had formed a connexion with one who murdered her husband in a manner too shocking even to be alluded to, and had done all that was infamous and outrageous and violent, except the last act of her disgrace, that of marrying the murderer of her husband. It was under her direction and for her benefit at that time, when all law had ceased in the country. It was in the very year when confusion reigned throughout the country in consequence of the dethrone-

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(a) *Sed vide ante*, 288, (d).

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ment and murder of *Edward* the Second, and the infancy of *Edward* the Third—it was in that very year that the first assession was holden for this manor, for the purpose of extending Isabel's rights, at the expense of the rights of these conventional tenants, and of laying a foundation for claims which are attempted to be grounded upon these Assession Courts. Immediately after what had taken place, there is a change in the mode of entering the tin fine. Before that time the tin fine was entered always as a separate head, "fine of tin of free conventionaries 20s." uniformly; "fine of tin 20s." and so forth, in regular series, until the Assession Court came into operation. Now mark the change which takes place in 16 *Edw.* 3, (1343;) "rents of assize 7*l.* 15*s.* 7*d.*, conventionaries 18*l.* 0*s.* 8*d.*," making in the whole 25*l.* 16*s.* 3*d.*; but as that includes the fine of the free tenants and the Stannary fine, 14*s.* 2½*d.*, they leave it carried out as the whole sum 25*l.* 2*s.* 0½*d.* Then it says, 20*s.* for the fine of tin of St. Austel. Now in this way in which they chose to disguise it here.—[*Lord Tenterden*, C. J. "Received of St. Austel." It first occurs here. In some of the documents it is said to be "of St. Austel," and afterwards the same sum is mentioned without saying "received."] The 20*s.* is given, but it is referred to in a different way. But look at the caption of seisin five years before, namely, in the 11 *Edw.* 3; that enumerates the individual tenants in the town of St. Austel, and the tin fine paid; so many pence, making altogether eleven-pence halfpenny. You find this tin fine mentioned in another way time after time. It is sometimes called "fine of tin," sometimes "belonging to St. Austel," sometimes "from St. Austel," sometimes "in St. Austel." All the accounts which have been put in give the fine of the free tenants either at 14*s.* 3*d.* or 13*s.* 3*d.*, and not one of them so much as 20*s.* We cannot have access to the account of 38 *Edw.* 3. [*Lord Tenterden*, C. J. You get that fact just as well from the 15 & 16 *Edward* the Third. I find that is just the same]. My argument is, that after the important period of 7 *Edw.* 3, these changes

were effected. No doubt this is an entry of it under the town of Saint Austel, but I say, an entry quite inconsistent with the caption of seisin. I believe the caption of seisin stated the very names of the individuals in the town of St. Austel. [Lord *Tenterden*, C. J. This is only four years after the caption of seisin.] They made very great progress; they lost no time. In the account for the 15 & 16 *Edw.* 3, appeared there 20s. "received for the fine of tin in the town of St. Austel." Our inquiry there is how did it arise, who paid it? The account itself is silent. It only says, "fine of tin of the town of St. Austel." We have it in evidence that there are conventional tenants of the manor of Tewington in the town of St. Austel; that was proved by the parol evidence yesterday; but we have also in the documentary evidence a kind of ascertainment what this 20s. means, and which of the tenants in St. Austel have paid it. In all probability it was put under the head of "the town of St. Austel," because they were then trying to make a change as to these conventional tenants in the town of St. Austel. No doubt you have tin fine in the town of St. Austel; but not *worth* 20s.; nothing like it; but so many individuals, one after another, proved to be conventional in St. Austel, each having to pay tin fine. The amount that each person pays is stated in the whole to amount, not to 20s., but eleven pence halfpenny; that is in the caption of seisin only five years before. Therefore, I have a right to say, that this 20s., said here five years after to be paid in the town of St. Austel, was either paid by conventional tenants there or elsewhere, including those who paid the eleven pence halfpenny. Then it was paid chiefly by those conventional tenants who paid much more than eleven pence halfpenny, who are mentioned as paying in other documents, and among other documents in this very caption of seisin. The caption of seisin does not leave you to seek who pays the fine, for it expressly says, tin fine, paid first by the free tenants, and next by the conventional tenants, thus: "*A. B.* renders to the lord fine of tin," and so on.

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This, without saying more, says, "the whole fine of tin by the conventionaries and natives is worth by the year 20s.;" the very same sum which five years afterwards is ascribed to the town of St. Austel. That is not the only document; for there is an extent (a) in the 1st of *Edw. 3*, (1327,) in which it is stated, "rents of free tenants 7*l.* 16*s.* 1½*d.*, fine of tin 14*s.* 3½*d.*." Then there is lower down, fine of tin 20*s.* This cannot be for the free tenants. It cannot be they who pay the 20*s.*; their tin fine is here said to be 14*s.* 3½*d.*, and the 20*s.* is for the conventionaries. "It is worth by the year" is the expression; the same which is used in the caption of seisin. "Tin fine of free and native conventionaries *worth* 20*s.*," just as it is eleven years afterwards in the caption of seisin; so that here you have not only an inconsistency in the supposition of 20*s.* being for the St. Austel people alone, inasmuch as the caption of seisin only mentions 11½*d.*, but you have the caption of seisin itself, which tells you that 20*s.* is paid by the free and native conventionaries. "Native" is evidently a mistake. Here the words, "worth by the year" are changed, and each individual is said to *render* by the year for fine of tin. It does not say how much. When they sum up the whole at the end, they say the whole fine of tin together paid by those individuals, is worth by the year 20*s.* Before leaving this subject of the fine of tin, I must remind you of the manner in which it is mentioned. First; It is said to be *per annum*, "by the year;" whereas all those payments which are fluctuating and variable, are time after time mentioned in this way, "he renders so much *this* year." Then, in describing the fine, the expression is "*de quâdam consuetudine certâ*," as we should translate it, a certain custom *certain*, a particular custom *certain*; "certain" to distinguish it from that which is fluctuating; among other things, from toll of tin, which is *ad valorem*, being estimated by the quantity of tin taken, and is constantly fluctuating; but the fine of tin, whenever it is mentioned, is always either 13*s.* 3½*d.* or 14*s.* 3½*d.* for free tenants, or 20*s.*

(a) *Ante*, 164. Appendix, L.

for the conventional tenants. The Attorney General will not take upon himself to say that these tenants are leaseholders, that they might be turned out at the expiration of their term, or might have their rent raised upon them, according to the caprice or interest of the lord. He feels what the effect of that would be, and therefore he is anxious to tell you, that it is an indefeasible title, that they have it for ever, as long as the right endures, a right to perpetual leases. But I think I shall satisfy you and their lordships that this is a freeholding or it is nothing; and my learned friend felt the difficulty of that; he said, I will not venture to say what it is, all I am called upon to say is, that it is not a freehold; but he must go a step further, because, in order to prove it not to be a freehold, he should shew it is something else. I shall shew the negative of that which he states it to be. He says they attend the Assession Courts, and that at those courts they take to hold in a particular way. The body of the defendant's case in respect of Assessions, consists of what they term the Assession Rolls, which are produced in immeasurable quantities. I do not deny that from the time they first began to attempt to convert this holding into a leaseholding, they have been constantly holding those Assession Courts and making up these Rolls. The weight and authority of these Assession Rolls upon the rights of the tenants, are very different from those of the court rolls of a manor. Tenants are bound by what appears upon the court roll, as the evidence of the custom of the manor or the nature of their tenure, because this is a court which they belong to. The manor court is one which they constantly attend, and at which they do suit and service; it is the court at which they take their title to their copyhold tenements. The steward presides over them as representing the lord; and at that court the jury or the homage of the court attend; but above all, it is at that court, or at some emanation from it, that they receive the titles to their estates; accordingly, if either the court roll is produced, or a copy of that roll which is the tenant title, it is in vain for the tenant to say that he denies its authority,

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because the answer is, it is that upon which you hold your estate. It is your title-deed; you have taken it; it has either come to you, and you appear as admitted as heir to your ancestor, or it is your own voluntary act in having taken it. But in the case of these assession rolls, the distinction is manifest and obvious, namely, that though the tenants attend those courts, they do not take their titles there. They are not admitted to their tenements by any agent of those courts. They do indeed frequent those courts for certain purposes; but the court by the authority of which they come into possession of the title to their tenement is the manor court before the steward; and the document by which they hold it is the copy of the roll given to them by the steward, quite separately and altogether independently of the assession. Some little dispute was attempted to be made (a) as to the nature of the two courts in these assessionable manors. It was said that there is no court holden in the manor, that all the courts holden are special, that there is no trace of a general court; and yet some of the documents produced purport to be the rolls of the surrenders and admittances at courts, and are generally styled courts held for the manor. In the caption of seisin (b) it is said, that there is there holden a court from three weeks to three weeks. Mr. Lethbridge (c) proves that a court-leet is holden twice a year in the manor of Stoke-Climsland, and that at that court-leet surrenders and admittances are passed; but that is at the court-leet, which is well known to be a court of criminal jurisdiction, and to have nothing to do either with the freeholders of the manor or with the customary tenants; but he tells you, that at the same time, and that is a very common thing in manors, that there is held a manor court; the two other courts are held together, the court baron and the customary court; and this court held twice a year, though called a court-leet, may really be taken to be a regular yearly holding in that manor of a customary and freeholders' court, a court baron. An experienced steward has stated, that though originally a court

(a) *Ante*, 310.

(b) *Ante*, 156, 159.

(c) *Ante*, 293.

from three weeks to three weeks, it came to be an occasional court holden only when there were any surrenders to be passed. Regularly it should be holden every three weeks; but as they may not have an admittance to pass in a year or two years, perhaps, they suppose it to be holden as it were by a sort of constant adjournment, always supposed to be holden, but in point of fact not holden for business unless when there is business for them to do; so that these special courts holden for the purpose of passing surrenders and admittances, are neither more nor less than the three weeks to three weeks courts held by adjournment. This being the case, we produce the rolls of the manor court, which are evidence respecting the tenure; evidence, so far as he was a party, against the tenant; but evidence most unquestionably against the lord; for what right has the lord to make a copy of a court roll of his manor as the title on which I am to hold my tenement, and then to hold another court unconnected with the first, and there grant me an estate different from that described on the court roll. Whether any person, with or without the authority of the lord, chooses to make up an assession roll behind my back, and assumes to grant me a leasehold interest, is to me totally immaterial; for I have had previously granted to me by the copy of court roll of the manor court, by the authorised officer of the lord, an estate to hold to me and my heirs and assigns for ever, according to the custom of the manor.

But, besides these assession rolls, they have produced other evidence, it seems, of the holding from seven years to seven years, namely, the caption of seisin and the parliamentary survey. The caption of seisin is, like the assession rolls, clearly and indisputably admissible evidence. It is returned by a public officer to the duchy, inrolled there, kept as a record there, and the high prerogative of the Duke of Cornwall, who is always to be the eldest son of the reigning king of this country, authorises the reception of the document in evidence before you, according to the strictest rules of law; but the weight of that evidence is for your judgment. It comes not at all from the tenants, it is a

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transaction entirely between the lord and his officers; it is an instrument stating that the lord to whom the manor had been conveyed by grant from the crown, took seisin of that manor, and thereby obtained possession of such and such tenements holden in such and such a manner; and in point of weight and value, if it be evidence for the lord when it makes for him, it is equally evidence against him when it makes for the tenant. It is for the lord just of so much value in the scales you are holding between the parties, as a letter written by the lord to his steward, or as an answer from the steward, pretending to say that the man to whom he had granted a freehold holds only for seven years. With respect to the parliamentary survey, that document is supposed to be very accurate; where it has been compared with other evidence in certain cases, its accuracy has been confirmed; but, nevertheless, it is impossible to avoid reflecting upon what the objects were with which the survey was prepared. In the time of the Commonwealth, when it was made, the rulers of the country had got possession of the lands of the late king, or, as they call him "Charles Stuart, late Duke of Cornwall,"<sup>(a)</sup> and which were then "settled in trustees for the use of the Commonwealth," which Commonwealth was represented by the parliament, by whom the survey was ordered to be made; consequently, the parties beneficially interested in those possessions which had lately belonged to Charles the First, were the very parties who directed the survey; and considering who were the worthy individuals appointed to make the survey, one may, without any great stretch of imagination or any great lack of charity, suspect that when persons who had the same views with those who appointed them made the survey, they were very ready to increase and enhance

(a) The Duke of Cornwall mentioned in this document would be Charles the *Second*, who had been duke from his birth in 1630; but this slight inaccuracy does not affect the argument. The title of the Duke of Cornwall seems to fall *per se* when the father ceases to be

king *de facto*; as upon the deposition of Henry VI., Charles I., and James II., (Mann. Exch. Prac. 391;) unless in the last case it be thought to be about as reasonable to say that the infant duke *abdicated the dukedom*, as that his father abdicated the kingdom.

by all means in their power the possessions of the parliament, their masters, who appointed them to survey; and if I found them stating that the tenants had very large rights, and that the lord had none, or admitting anything against the lord, that is, against the commonwealth, I should be compelled to say, it is doubtless not only admissible evidence, but strong evidence. Whenever it makes for the tenants and against the rights of the duchy, the parliamentary survey is a witness above all exception; but not where it makes the other way; for it comes then exactly within the objection which we make to the caption of seisin and the assession rolls, namely, that it is evidence made by the lord or his steward. This observation applies to the parliamentary surveys in every case in which they are tendered. There is another survey, called the New Value of Benefices, in the 26 and 27 *Hen.* 8. The king was about to take the first fruits and tenths; but he also had in view taking possession of the property of the monasteries, which he soon afterwards did; and as he was likely soon to wrest from the church that property, there is not to be found from beginning to end of that survey, a mention of tithe modus. In consequence of this, though the New Value of Benefices is admissible evidence, it is never used as grounding a presumption that there was no modus; because those who made this survey had no motive for cutting down the value of the property which the king was about very soon to take into his own keeping, and, therefore, that book is of no value whatever in disproof of modus. On the other hand, if that parliamentary survey mentioned a modus, it would be very good evidence in favour of that modus; because it was the object of the persons making that survey, as it was the object of those who valued the possessions of Charles Stuart, by their account to make the survey as favorable, in respect of the amount of the Crown property, as they could, and, of course, to depress the value of property, as against the tenants. If, in the survey I have just alluded to, it had been the object of the surveyors to make the

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benefices appear to be as low as possible, and to shew that the clergy were not sufficiently paid, the modusses would have been carefully registered; and if no modus were found to be registered there, that would raise a strong presumption that no modus existed at the time; for it would be said, wherever a modus is to be found, it is mentioned. Just so here; the object of these parliamentary surveyors was to cut down as low as they could the tenants' property in order to raise the property of the Crown; and, for this reason, though very good evidence for the tenant, it is of very little value when it cuts down the value of the tenants' interest and raises that of the lord. According to this survey, the tenants come to the assession court, and take their tenements, "not that their former title to the same doth then determine, it being to them their heirs and assigns for ever, according to the custom of the manor, but for that thereby divers advantages do or may accrue unto the lord, that thereby the lord shall come to the knowledge of his present tenants, and in case of incroachments on the waste, that either a rent may be paid or the lord take possession; and, for the more perfect remembrance and knowledge of who are tenants of the said customary lands and tenements, and what issues and profits might grow due to the lord of the said manor out of and for the same, there hath been held an assession court." Upon this document, then, these are given as the reasons why these courts are holden; not, as alleged by the defendant, because it was the great court, as if there were only that court which had authority to grant titles to the tenants. And what signifies their attending this court?—It might signify if none but the conventionary tenants attended the court; but all the free tenants go there also. But admitting, for argument's sake, the whole evidence of the caption of seisin and the parliamentary survey, as regards the only qualification annexed to the title of the tenants, that of taking from seven years to seven years, I would remind you, that of 500 different rolls in the manor of Tewington, which have been examined, only two are to be found which are not con-

veyed in terms to the individual "his heirs and assigns for ever, according to the custom of the manor," or in terms to that effect. There are about 270 which have that description of their tenure in so many words; there are about 15 or 20 which grant "to him and his assigns for ever, according to the custom of the manor," dropping the word heirs, whether by mistake or from an attempt to make an incroachment, cannot now be ascertained. But of the whole 300 surrenders and admissions, there are three only in which any reference whatever is made to a holding from seven years to seven years, and including in those three the most antient of all, that of 32 *Hen. 8*, in which the words "*usque ad proximam assessionem*" are found interlined upon one part of the admittance, the surrender having no reference to it whatever; so that in that most antient of all, *A. B.* comes and surrenders into the hands of the lord or steward, on condition that *C. D.*, the surrenderee, may be admitted, "to hold to him and his heirs and assigns for ever," without any qualification adjected; and then it goes on to say, "and whereupon the said *A. B.* came before the said steward, and was admitted to hold to him his heirs and assigns for ever, according to the custom of the manor;" but then comes the interlineation *usque ad proximam assessionem*, until the next assession. The surrender therefore is, that it should be "to hold to him and his heirs and assigns for ever," without any restriction, but the admittance is, that the grantee should hold not to him his heirs and assigns for ever, as the surrender to the steward had stated that it should be given to him, but qualified by the addition of "to the next assession." We next inquire what kind of title it is, and with what incidents, and with what consequences the tenants hold in this manor. Admitting the manner of holding to be exactly such as the defendant states it, granting all his evidence to be true and unimpeached, it would be too hard for any lawyer to define what sort of a holding this is. If a man takes an estate to him and his heirs and assigns for ever, to hold according to the custom of the manor, I can

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very easily understand how that reference to the custom of the manor may let in a great deal to qualify the larger part of the grant; but where the first part of the grant gives him a fee simple, I cannot conceive how words can instantly afterwards be added, or be capable by law of being added, which should cut down that grant to an estate for seven years. There certainly is a very great difficulty in ascertaining when the words "heirs and assigns for ever" first found their way into these grants, unless we assume that the estate was originally a freehold. They must have come in before time of memory, or between time of memory and the first assession, (either in the 1 *Edw. 3.* or the 7 *Edw. 3.*) or subsequently. I would say between the time of memory and the creation of the duchy (*a*). If they came in before the time of memory, they either came in with that which is now said to be the qualification, namely, from seven years to seven years, or without it. If they came in without it, *cadit questio*; for if the fee simple part of it be the elder part, the other, "from seven years to seven years," having come in since time of memory, there is an end of the difficulty; If, however, they both came in at the same period before time of memory, then how is it possible to make the two in legal intendment consistent with any notion of a legal estate? But it is quite clear that the words could not have come in, according to the argument and the evidence on the other side, either before the time of memory or between the time of memory and the creation of the duchy; because the assession roll which is first produced, and at the head of which stands the commission under which that assession was taken in the 7 *Edw. 3.* negatives the possibility of "heirs and assigns for ever" having then existed in the grant; for it proceeds upon the narrative that the earl has such high rights that he may, without doing wrong to any person, take them all into his own hands. It recites that "whereas we have right by law to take them into our hands, and to lease them out as we please, to the same or any other persons (*b*). [*Bayley, J.* You do not state that ac-

(*a*) *Ante*, 179.

(*b*) Between 1189 and 1337.

curately. The commission states that there are divers conventional tenants, whose term expires at the Michaelmas following, and therefore authorises the commissioners to let them *de novo*, either for life or for years; and I think you will find in that a head of "tenures not let."] There is a head of that sort no doubt; and it places my argument in a very strong point of view, that there could be no heirs and assigns in the title; for the Crown here sets forth, that instead of being held to heirs and assigns for ever, their terms were expiring next Michaelmas, and therefore gives the power of letting again either for years or for life, as they might think most consistent with the interest of the Crown. Have they then come in since the reign of *Edw. 3*? Certainly not; for the grant to the Black Prince makes the whole inalienable from the duchy. Whatever was in the Duke of Cornwall then, must continue to be in the duke for ever; consequently these words cannot have crept in after the reign of *Edw. 3* by any means whatever (*a*). The defendant's counsel

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(*a*) In *Lopez, Bart. v. Andrew* and others, the defendants, in trespass for sinking a shaft, pleaded that the king was seised of the *locus in quo* in right of his duchy of Cornwall, and that they, as his servants, committed the supposed trespasses. In other pleas the king was stated to be seised, *jure coronæ*. The replication took issue upon the seisin. At the trial before *Littledale, J.* at the Devon summer assizes, 1826, it appeared that the *locus in quo* lay between high and low water-mark on the left bank of the navigable river Tavy, which flows into the Tamar. Contradictory evidence was given as to the enjoyment of the *locus in quo*, which on both sides was very slight. The learned judge told the jury that the land between high and low water-mark belonged *primâ fucie* to the Crown, but that

evidence of enjoyment by the owner of the adjoining manor would justify the presumption of a grant from the Crown, and that although the spot in question appeared to fall within the terms of the parliamentary grant to the Black Prince, (*post*, Appendix, D.) and, therefore, to be inalienable, yet the jury were at liberty to presume a statute granting the land between high and low water-mark to some former owner of the plaintiff's manor. A verdict was accordingly found for the plaintiff, which, in the following term, *Manning* moved to set aside; but the Court held that the direction of the learned judge was correct in point of law, and refused the rule.

The doctrine of presumption has since received a material qualification in the case of *Livett v. Wilson*, 3 Bingham 115, reported more

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feel the difficulty of this, and to obviate it they say now that these tenants have a perfectly indefeasible title, because they have it to them, their heirs and assigns for ever, and there is no calculating any period of time at which they would not have a right to renewal. But as it is impossible that the use of the words "heirs and assigns for ever" should have been introduced subsequently to the act of parliament creating the duchy and its lands inalienable, how did this indefeasible title grow up? It can be indefeasible only by force of custom, and from having been time out of mind parcel of the custom, and confirmed by grant prior to the creation of the duchy. But this estate is described as a holding to them and their heirs and assigns for ever, according to the custom of the manor. Now what is that custom which qualifies the general fee simple, that would have been otherwise granted by the first words? The defendant says it is a custom of granting from seven years to seven years, by way of leasehold, and to that they add a right to perpetual renewal; but why do they add a right to perpetual renewal unless it was time out of mind? No doubt there are instances in which the reference to the custom of the manor qualifies the general description of the tenure that precedes it; and in considering the nature of a tenure, to hold to me "and my heirs and assigns, at the will of the lord, according to the custom of the manor," the custom of the manor shall be taken, no doubt, to restrain and fix the will of the lord, and to give me a larger estate by the cus-

fully, 10 B. Moore, 439. That was an action of trespass *quare clausum fregit*, to which the defendant pleaded a right of way granted by a deed lost by time and accident. Issue on the grant. The judge, according to the former reporter, told the jury, that if upon this issue they thought the defendant had exercised the right of way uninterruptedly, for more than 20 years, by virtue of a deed, and that that deed had been lost, they would

find a verdict for the defendant; if they thought that there had been no way granted by deed, they would find for the plaintiff. The jury said that they could not find any deed, and gave a verdict for the plaintiff, which the Court, upon argument, refused to set aside, holding that the direction had been particularly correct. The report in 10 B. Moore, though it states the direction more at length, agrees in substance with the above.

tom than I could have otherwise had. But you cannot by the custom turn the tenant's interest into a lesser tenure; you cannot, instead of qualifying and restricting the will of the lord, extend and enlarge the will and the right of the lord, and so qualify and restrict the right of the tenant. The common copyholder by the custom has his estate enlarged, in proportion as the lord's will is qualified and defined by the custom; but here it is a reversed operation; for there are first words granting a fee, the largest estate, and then the custom is let in, not to qualify the will of the lord, as it does in a common copyhold, but to extend the power of the lord and to restrict the right of the tenant. It is quite inconsistent with every principle of our tenures, and contrary to all the analogy of the law of real property, to let in the custom, not to restrict the right of the lord, but for the purpose of first restricting the right of the tenant and then again enlarging it. What an anomaly in the law is this! I am told it is like the Irish leaseholds (*a*), a lease for lives or a lease for years, with a power of perpetual renewal. But that is quite different, and is perfectly intelligible. I have, by virtue of the covenant, a right, either to sue for damages against my lessor, if he refuse to renew when my term is out, or to go into equity to compel him so to do. I have in equity a right to enforce the performance of this act against the lord, or I may proceed at law for damages for his breach of the covenant; but in such a case, when the term is determined, the estate is gone, my interest has expired, and I am out for ever; I can maintain no ejectment, except upon the bare possession (*b*); I have no title upon which I can maintain an ejectment; I was a leaseholder, I have ceased to be a leaseholder. I have indeed a right to damages against the lord if he breaks his contract by refusing to renew, or in equity I may compel him to renew, but the estate which he formerly granted to me is gone. But I submit that a grant before memory to *A. B.*, his heirs and assigns for ever, according to the custom of the manor, to come from seven years to seven years (*a*) *Ante*, 308. (*b*) And that only as against a stranger, *ante*, vol. i. 220.

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and renew his term, and pay 6*d.*, amounts in law to a fee simple, qualified by the custom of the manor as to the right of the party, in all respects except the holding; that it is a fee simple; and that words of this sort cannot make such a difference in the holding as to change a known and intelligible tenure into an estate quite new and unknown in the law, which is neither fee simple, nor fee tail, nor leasehold, nor an estate for years. It has been decided, that though words be used in a conveyance inconsistent with the nature of a fee simple estate, as words prohibiting alienation, where the intent is that it shall be an estate in fee simple, the words inconsistent with the fee are not to be regarded; for the alienee must hold it as an estate which the law knows and recognises, and knows how to deal with. Whatever be the nature of the interest, if it amounts to a fee, that is just as good for my purpose; for I contend that it is an interest of a peculiar kind, a freehold in point of interest, though not with respect to the services whereby it is holden. The account which is given of this estate by the defendant is perfectly inconsistent with itself and with all principle; but the account which we submit is consistent with legal principle; and the kind of interest, both as to the tenure and quantity, an estate perfectly well known in the law. We say, that in order to ascertain what the estate is in a manor at this day, it is necessary to ascertain what it was in its origin, and that the origin of this estate will determine what it is to be now. If it was originally holden in socage in ancient times, it is perfectly well known, and the authorities, which I shall only refer to, all decide that this tenure becomes a freehold under the name of customary freehold. I think Mr. Justice *Blackstone* lays it down, on the authority of *Bracton*, *Fleta*, and *Britton*, and others, who wrote about the time in question, one being in the very reign of *Edw. I.* that there were certain persons in manors, and chiefly, he says, in manors of ancient demesne, who, after ejection at the Conquest, by the strong hand of power, took back their tenures by inferior services; they are not

villeins, as they would have been if they had derived their title from the persons who had them as villeins, and not as freeholders; but they are the representatives of those who held as freemen, but by baser services, and, consequently, as *Blackstone* states, took by that holding a freehold in point of interest, though not a freehold in respect of tenure (a). Mr. Justice *Blackstone* says upon that subject, "There were, at the time of the Conquest, certain freemen, who held their respective tenements freely, by free services, or by free customs, and being first ejected by the hand of power, they afterwards returned and took their own tenements, to be held in villenage, doing therefore services that were base and servile, but certain and expressed by name." Having described at great length, from the accounts of these old writers, the transaction out of which those freeholds arose, he proceeds to state the kind of interest therein, which the owner of such an estate might be said to have, he says, "When these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate for life or in fee, but yet continued to be styled in their copies, tenants at the will of the lord, the omission of which in their state of villenage would have been a manumission of their persons (b), the law still supposed it an absurdity to allow that such as were thus nominally tenants at will could have any freehold interest, and therefore continued, and still continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant, though he really holds to him and his heirs for ever, since he is also said to hold at another's will. But as to these copyholders of free or privileged tenure, the case is otherwise. They do not, nor ever did, hold at the lord's will, either in fact or nominally. There is, therefore, no absurdity in allowing them capable of enjoying a freehold interest, and on that account the law doth not suppose the freehold of these lands to rest in the lord in whom they are holden, but in the tenants themselves." Your Lordships will find

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in the case of *Gale v. Noble* (a), which was an ejectment brought by the lord against a tenant, and a verdict had been

(a) Carthew, 432. *Gale v. Noble* has been considered as an authority for two propositions, first, that where a tenant is admitted to hold "to him and his heirs according to the custom of the manor," without adding the words "at the will of the lord," the estate which passes is a customary freehold; secondly, that such customary freeholder is punishable of waste. In order to enable the reader to form his own opinion as to the correctness of these positions, the case of *Gale v. Noble*, which is very short, is here transcribed.

"Upon a trial at bar, in ejectment for lands, parcel of the manor of Corsham in Wilts, which, by very ancient books of that manor, appeared to be parcel of the duchy of Cornwall, and still pass by surrender and copy of court roll, but yet are not copyhold, because it did not appear in any of the rolls or copies now produced that they are granted *ad voluntatem domini manerii*, but only *tenendum secundum consuetudinem manerii*; therefore it was resolved by the Court that these lands are not copyhold, but a customary freehold, and for that reason the verdict was for the plaintiff, against whom the verdict was found at the *nisi prius* for a forfeiture by committing waste, the plaintiff in that action taking it to be copyhold, as all the tenants had constantly done."

Carthew is said to be an inaccurate reporter, and the above statement is not very clear. Corsham never formed part of the *duchy* of Cornwall, not being included in the

parliamentary grant to the Black Prince. The assertion is probably founded upon the circumstance of this manor having been frequently annexed to the *earldom* of Cornwall. Corsham was granted by Henry 3 to his brother Richard, Earl of Cornwall, (Appendix, B.) in special tail, *scil.* to him and to his heirs of the body of his wife, Senchia, (Sancha of Provence,) *Plac. de Quo Warranto*, 803. And see Testa de Nevill, 154, 192. From Richard, this manor descended with the earldom to his youngest but only surviving son Edmund, (Camden Britann. 87.) It was granted by Edw. 1 to his daughter Mary, a nun residing at Ambresbury, Wilts. (1 Abbrev. Rot. Original. in Scacc. 122.) It was granted by Edw. 2 to Piers de Gaveston. (3 Rym. Fœd. 2; Cal. Rot. Chart. et Inq. ad quod damnum, 140, 142.) It was afterwards committed by the same king to George de Percy, (1 Abb. Rot. Orig. in Scacc. 186,) and subsequently to William de Horwode, (Ib. 189,) rendering 100*l.* annuatim. In 8 Edw. 2 the manor was regranted by the king to his said sister Mary. (Ib. 217.) Corsham is not an *assessionable* manor. As to the customary tenants of this manor, *called consuetudinarii*, *vide post*, 340, (a)

It is not invariably the case, even with undoubted copyholds, to express in the admittance that a tenant holds at the will of the lord. This clause is frequently omitted in the west of England, where copyholds are held for lives, and some cases where they are gra-

obtained at  *nisi prius*  for forfeiture on account of waste, the defendant and all the tenants (a) having always supposed it

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in fee. In the manor of Taunton Deane, in the county of Somerset, there are no formal admissions. The only evidence which the tenant has of his title is the surrender to himself or to his ancestor, *habendum* to the surrenderee and his heirs, according to the custom of the manor. In such a document, inasmuch as the surrenderor means to part with his whole interest, an allusion to any restriction upon the tenure, such as even the formal condition imposed by the words "at the will of the lord" would not only be unnecessary, but would sound as if it were intended to make the surrender defeasible as between the surrenderor and the surrenderee. Besides which, what is called the *habendum* in the surrender is merely the declaration of a use, to be executed by the grant of the lord. In such a declaration of the use, it would be quite out of place to state the different contingencies by which the estate in respect of which the trust had been declared was determinable. The proper time for introducing the restriction would be when the lord came to admit in pursuance of the surrender. So in this manor of Tewington we find instances in which, though the surrender is to a party and his heirs *secundum consuetudinem* generally, yet the admittance is, *habendum* to the surrenderee and his heirs from seven years to seven years, *secundum consuetudinem*. Supposing, however, the rule to be generally true, that the omission of the words *ad voluntatem domini* shew the estate not to be

copyhold, then if by law there can be no other estate passing by surrender and admittance, except a *customary freehold*, or, since *de non apparentibus et non existentibus eadem est ratio*, if no other species of estate be presented to the consideration of the Court, it would necessarily be considered that the omission of these words proved the estate to be customary freehold. This, as far as the report is intelligible, appears to have been the point determined in *Gale v. Noble*.

Whether, supposing *Gale* to have had a customary freehold, he was entitled to commit waste, is a point scarcely noticed. In *Brown v. Rawlins*, 7 East, 428, where *Gale v. Noble* was cited as an authority to shew that customary freeholders have such a right, Lord Ellenborough says, "The case is only reported in *Carthew*," and again, "What the usage was in that case, does not appear by the report."

(a) Perhaps the case of *Gale v. Noble* may upon this point be reconciled with what is considered to be the law, by reading part of the last sentence as included in a parenthesis, thus, "for a forfeiture by committing waste, (the plaintiff in that action, i.e. *Noble*, the lord, taking it to be copyhold,) as all the tenants had constantly done." It seems more reasonable to suppose that the Court received evidence as to the acts of all the tenants in committing waste, than to suppose that such evidence applied to the opinion of those tenants, *à fortiori* to the opi-

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to be a copyhold estate, though the words were according to the custom of the manor, it passed for the plaintiff; but there was afterwards a trial at bar in the 9 *Wm. 3*, and then the Court held, that as they were not held at the will of the lord they were not freehold, but customary freehold, in which the tenant had an interest *quasi* freehold, and not at the will of the lord. In the case of *Crowther v. Oldfield*, which as *Salkeld* (a) and Lord *Raymond* (b) say, was decided, after great discussion and consideration, it was held that a man cannot be a copyholder who holds by copy according to the custom, unless it be also *ad voluntatem domini*. Lord *Holt* says this is the great difference between copyhold and customary freehold, the former comes from the lord, the latter from the surrenderor. So also in 1 *Wms. Saunders*, 348, (6) it is laid down that if the words "*ad voluntatem domini*" be omitted in pleading, it is fatal, and it will be intended an estate in fee at common law. Lord *Coke* (c) states still more strongly, that they have a frank tenure, and that the frank tenure, where the holding is not at the will of the lord, is in the tenant, and not in the lord (d). *Hussey v. Grills* (e) is to the same purpose. The defendant has denied a freehold here altogether, and has relied upon the evidence in the cause as negating that claim in three ways; first, they say this is a very odd kind of freehold, when it is held by copy of court roll; and Sir *James Scarlett*, when we put in the first copy of court roll, said, "There is an end of your case; it is copyhold." I need hardly remind your Lordships, that a freehold in a manor may be held by copy; there are cases of that kind. It should seem, indeed, there are even freeholders, properly so called, and not customary freeholders, though that is very rare, who do hold by copy. Lord *Coke* states that it is not copyholders alone who hold

nion of the plaintiff himself, as to the legal quality of the estate; and what appears to be still more important, the statement, if read with the parenthesis, accounts for Noble's having brought the first ejectment, and at the same time fur-

nishes an intelligible ground for the decision of the Court in the second.

(a) 1 *Salk.* 364.

(b) 2 Lord *Raym.* 1225.

(c) Copyholder, sect. 32.

(d) *Sed vide Mann. Exc. Pra.* 359.

(e) *Ambler*, 299.

by copy. In *Hughes v. Harris* (a), the Court says, "It is not held *ad voluntatem domini*, so it may well be intended a freehold, and there be many freeholds in Wales granted by copy and verge." Lord Coke mentions some in Northamptonshire, and in *Perryman's* case (b) there is the case of Lidford Castle (c), part of the duchy of Cornwall, where the freeholders are expressly recited as holding by copy; and he mentions the tenure in question, where the freeholders have their estates forfeitable, as if it were common copyhold, holden by copy of court roll, but which appear to be a sort of fee simple on condition.

It is objected on the other side that this cannot be freehold, for it has not a conveyance passing a freehold; freeholds passing by feoffment and livery of seisin. Lord Coke expressly says, "Copyholds have the incident of passing by surrender, yet so forcible is custom, that by it a freehold of inheritance may also pass by surrender, and be delivered over by the bayly to the feoffee to be inrolled" (d). Again, it is said, in opposition to this being a freehold interest, that there are pledges to repair; by the copy of the court roll the tenant gives pledges to repair his tenement; how this

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(a) Cro. Car. 229.

(b) 5 Co. Rep. 84.

(c) Lidford was in the crown, and tallaged 19 Hen. 2, Madox, 485; granted to Richard, Earl of Poitou and Cornwall, 23 Hen. 3, 1 Abb. Rot. Orig. 2; and to Hugh de Audeley and Margaret his wife, widow of Earl Edmund, and afterwards of Piers de Gaveston, by Edw. 2, ib. 241; included in the parliamentary grant to the Black Prince, Appendix, D.

(d) Co. Litt. 59, b. In the margin Lord Coke refers to a case in Fitzherbert, *Corone*, pl. 310, which is as follows: "The abbot of B. challenged to have the year and waste, and the chattels of felons, of his franchise. To which it was said, that neither he nor any other

should have the year and waste, except the King, for all the land, but the chattels a man may have. And it was said, that if the abbot had entered he would have been in mercy, for without warrant; and he would have answered for the issues in the mean time; and such a case happens where he who was acquitted before justices, &c. But it was said that the land was of base tenure of ancient demesne, (*ante*, 231, (n.)). And it was asked whether they were villeins, or whether they could sell their lands against the will of the lord? And it was said, yes; but they surrender the land in Court by the rod. Wherefore the year and waste, &c. were awarded. A<sup>o</sup> 3, E. 3, Itin. North."

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crept in, whether as a part of the same usurpation by which much of their proceedings have originated and been carried on or not, it is unnecessary to determine; for the requisition to repair is not in the smallest degree inconsistent with a freehold interest, I mean with reference to freehold in point of quantity of estate, for which I am contending; because there may be escheats due to the lord, and a freehold may escheat as well as a copyhold, either for want of heirs or for felony, and the lord may be interested in seeing that the reparations are done, in order that when a tenement does fall to him by escheat, he may have it as it had been before granted. This appears to me quite a sufficient reason why, by the custom of this manor, the lord may so have arranged it with the tenant, as to maintain a security for the reparations being done when the escheat took place. Be it always observed, that although a great deal is said of pledges to repair, there is no one instance given of an enforcement of reparations; on the contrary, the instances are the other way; for the evidence on the opposite side made it clearly appear, that although there was nominally a viewer of reparations, yet his office was a sinecure. It is further objected that these tenants hold by rent. Do not freeholders hold by rent, and is not a quit rent notoriously an incident to a freehold? Last of all, it is said there is a heriot. Heriots are very common in copyholds, but they are not inconsistent with freehold (*a*). I shall not observe upon those cases to which a general reference was made by the Attorney General, as making against the claim to minerals in respect of this estate of customary freehold, further than to state to their Lordships, that it will be found that neither of those cases, *Burrell v. Dodd* (*b*), *Doe v. Danvers* (*c*), *Roe v. Vernon* (*d*), *Doe v. Huntington* (*e*), and *Brown v. Rawlins* (*f*), expressly decide the question, but the point arises

(*a*) See an attempt to reconcile the conflicting cases as to the right to recover distinct heriots, when a heriotable tenement has been reunited after severance; *Mann. Exch. Prac.* 2d ed. 341.

(*b*) 3 B. & P. 378.

(*c*) 7 East, 399.

(*d*) 5 East, 51; 1 Smith, 318.

(*e*) 4 East, 271.

(*f*) 7 East, 409.

incidentally in all of them. Something was adjudged in those cases which does not exist in this case; for example, in *Brown v. Rawlins*, supposed to be the most against us, whatever the surrender was, the admittance was to hold at the will of the lord; the authority of *Gale v. Noble* (a) would have applied there. In some instances it was to hold according to the custom of husbandry in the manors; which Lord *Ellenborough* said might apply to villein tenure. It appeared there that the minerals were always taken by the lord and his lessees, and were never claimed by the tenant. In that case the point arose upon a motion to set aside the verdict which had been given under the direction of Mr. Justice *Chambre*, who stated that it did not appear to have been made a question, whether it was customary freehold or copyhold; and there being conflicting evidence whether it was the one or the other, the jury found for the defendant; and the Court said they would not disturb the verdict.

The evidence given on the other side appears to me to be open to two observations. In the first place, a vast portion of it proceeds from agents of the duke, persons who had a direct interest in enlarging his rights, substantiating his claims, and limiting and restricting those of the tenants; and it is a hard thing upon tenants to be bound conclusively by such entries as the lord's steward may make in his account, shewing what money was received as between him and his employer. These receipts are made without the concurrence of the tenants, by a man of whom they know nothing, employed by the lord, and very possibly entering something in his book for the purpose of forwarding his employer's interest; and yet these accounts are to be conclusive evidence, not only of the receipt of money by him, but that he received that money in a particular respect, for a particular thing. A great deal of the evidence has been given which no one can think of questioning, namely, that within the duchy of Cornwall there are large rights of the duke, not at all in conflict with the rights of the conven-

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(a) *Ante*, 333.



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tionary or customary tenants; I call them conventional, because they are called so in the assession rolls; but in the ancient documents they are called customary (a) tenants. In respect of certain customs, and in respect of certain tolls, of which we find instances, there can be no doubt of the right of the duke to claim them. We do not deny that the duke has a right to tin; he has a right to toll of tin in bounded conventional tenements. The evidence shews, first, that when the conventional estate is bounded, half the toll tin is paid to the owner of the bounds, and half to the Duke of Cornwall; but when a conventional tenement is not bounded, the owner of the estate, the conventional tenant, receives the whole of the toll tin. This circumstance of the duchy title to toll tin in bounded conventional estates, explains the duke's having taken toll of tin in Mr. Rowe's Nansmellyn, which was bounded,

(a) The tenants of the manor of Corsham, which, though no part of the duchy of Cornwall, (Mann. Exch. Prac. 2d ed. 392 (g), *ante*, 333, (a),) were part of the possessions of the ancient territorial earldom, are called "*consuetudinarii*." "Manerium de Corsham ac diversæ libertates confirmatæ *consuetudinariis* manerii prædicti pro annuâ firmâ centum et decem marcarum, 6 *Edw.* 3." Calend. Rot. Pat. in Turri Lond. 115. "Amplæ libertates confirmatæ *consuetudinariis* manerii de Corsham, 24 *Hen.* 6." Ibid. 288. From these entries it would seem that the customary tenants of Corsham enjoyed peculiar privileges by a special grant. It appears from the same records, that, in 14 *Hen.* 3, certain liberties were granted to Ralph, the son of Nicholas, who then held the manor. Ib. 45. And in Testa de Nevill, 143, it is said, "Rad' fil' Nich'i tenet Cosh'm:

nescitur per quod servic': *et est de eschaetâ Norm'.*" (*ante*, 141, (d)). But these liberties granted to the lord would be distinct from the liberties of the customary tenants, which could only be granted by him. These were probably obtained whilst the manor was in the Crown. This was the case in 28 *Hen.* 3, (Calend. Rot. Chart. et Inq. ad quod damnum, 59,) at which time it was granted with other possessions that usually passed with the earldom of Cornwall, to Richard, afterwards King of the Romans, in tail, (*ante*, 333, (a)). Corsham descended to Earl Edmund, to whom a market was granted there, 13 *Edw.* 1, (Cal. Rot. Chart., &c. 106,) confirmed 30 *Edw.* 1, after the property had reverted to the Crown. (Ibid. 132.) This manor is found as part of the possessions of Earl Edmund by the inquisition, (*ante*, 150,) taken upon his death. 1 Calend. Inquis. post Mortem, 156.

and Carthew's having taken it from his Nausmellyn, which was not bounded, and it explains those leases which convey the duke's toll of tin on bounded estates. But there is not the least doubt that, besides toll of tin, the Duke of Cornwall is entitled, in many places, to metals and minerals where he is lord of the manor, but my learned friend contends that it is impossible to explain those instances of persons coming and taking leases of minerals, besides tin, and paying 600*l.* or 1200*l.*, consistently with our right. But we do not deny that just in the same manner as the Duke of Cornwall might lease the toll of tin, he might lease all mines and minerals other than tin, in the wastes of the manor, in the lands which were his own demesne lands, and of which he had not only the mineral right, but the right to the possession. In all these instances the duke had the mines and minerals; and of course all those leases apply to mines and minerals to be found in the wastes of the manor or the demesne lands; and that accounts at once for large sums of money being given for such leases. The Attorney General talked of incroachments by the tenants; but it appears to me that the incroachments are all on the part of the duchy. The lease to Vincent and Scobell contains a power to dig and search for minerals under the estates of different persons; this, however, is qualified by the provision that they must previously have the leave of the owners and occupiers; in the lease of 1717, there is the same clause; and then in 1742, the lease gives power to dig, leaving out the restrictive clause. This is what I call an inroad, the leaving out the qualification of obtaining leave of the owners and occupiers before they could exercise the licence to dig, and inserting in its place the words compensation to be given to the tenants. That compensation was to be settled by the duke's council, and therefore it was not very satisfactory, but that was better than nothing. The covenant inserted in this lease, on the part of the lessee, not to compromise any suits, in case any suits should be brought to try the right of the crown to enter and dig for

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minerals, is another proof of the infirmity of the right of the crown. Then comes the lease of 1763, wherein it is stipulated that the fine is to remain in the receiver's hands until the suit is determined in the Exchequer; and the Attorney General commented upon that suit as being of great importance in this cause. In that case there was an injunction obtained by the crown on the information of the Attorney General, and that injunction, I suppose, is made use of as evidence in favour of the present defence, on the ground that there was no application to dissolve it; but that was the case of a conveyance of the right under the lord's waste, as appears by the information. The informants severally inform the Court, "that they being about to dig and search for copper under *Trevelles Common*, or the common or wastes there, and the defendants claiming under grants made to them of the pasture of such common, and so on, in an outrageous and violent manner took possession of the copper which had been raised, and converted it to their own use, and denied the right of the lord, and so on." The defendants therefore claimed the minerals, or rather claimed a right to prevent the duchy lessee from working for them, upon a common or waste over which they had the pasture. I am ready to admit that there was no foundation for such a claim on the part of the defendants, and that the decision against them was proper; and in stating that I admit nothing which is not perfectly consistent with my present case; for there no interest was pretended to have been granted to the defendants, except the right of pasture.

Then, as the last stage of encroachment, comes the lease to Williams and Smith, in which they have given to them not only the power to enter and dig in all lands within the duchy, (for it is generally, whether conventional or not,) extending to all lands freehold, copyhold, customary freehold, freehold at the will of the lord, and all lands of every sort within the duchy; they are not only to have the power to enter and dig, (the clause of compensation being left out,) but to erect buildings for dressing the ore, warehouses,

countinghouses, and to turn and divert watercourses, as if the whole were the fee simple of the Duke of Cornwall, and as if no other freeholder could have a right to one blade of the corn that grew upon his land. The only thing I can find to equal this, was a deed made in the third year of that most excellent, virtuous, constitutional Prince, King *John*, who gives a power, not so great as this, the very year before he was driven out of France, having murdered his nephew, Prince *Arthur*, "to all tinnors working in these stan-naries, which are our demesne, to dig tin in wastes, of us our heirs and successors, and divert watercourses," so far they have a precedent, "as they have been accustomed, without hindrance from us our heirs and successors" (a). So that here all that *John* appears to have done, is a trifle to that which is attempted to be set up now, for he appears only to have estopped himself, his heirs and successors, from preventing them from doing that which they might have entitled themselves by law or by treaty with the parties to do. I have only to remark to you, once more, that even if there should be one or two or three acts of enjoyment on the other side, inconsistent with the right we claim for the plaintiff, and for the inhabitants of the seventeen manors, consisting of sixty or seventy parishes, the population of which would be 1000 or 2000 souls, who seek to have the enjoyment of the minerals as well as of the surface, it is not enough for them, in answer to this, to bring three or four cases in the instance of persons too poor or too timid to fight with such opponents. But if they went back as early as living memory can reach, which they have not done, and if they carried it even beyond the period of living memory, and had proof of many more than they have pretended to prove in this case, I ask, what kind of evidence must you have to satisfy you, from adverse enjoyment, that those have been instances often repeated and known by the parties against whom they are levelled, inconsistent as they are with those rights they are known to have, and those parties able,

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(a) *Vide ante*, 213; *post*, Appendix, E.

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as well as bold enough, to fight for their property and their rights? What number of instances must you have, and of what consistency, and of what clearness in themselves, must these instances be to persuade you to give a verdict which can have but one meaning, namely, that these men have no property, except a leasehold, defeasible at the will of the Duke of Cornwall?

Lord TENTERDEN, C. J.—The whole question in this cause is, whether the owner of a tenement, such as that which belonged to the plaintiff's testator, is entitled to the copper that may be found under it, or whether that mineral belongs to the Duke of Cornwall? The question is only as to the property in the mineral, when gotten and brought to the surface. There is no question here as to the right to enter upon the land, or to dig or to disturb the surface, in order to obtain it. It may well happen, and it does happen in many instances, that the right to the mineral is in the lord of the soil, but that he cannot come upon the land of his tenant, and sink a shaft or erect any other work in order to obtain it, without first coming to an agreement, and making his terms with the tenant. There are some cases in the north of England, I believe, of mines under copyhold tenements where the lord of the manor is entitled to the mineral; but in which there is no custom giving him the right to enter upon the land of his tenant to search for and obtain that mineral; and where the lord has a right to the mineral, but has not by custom a right to enter upon the land of his tenant, he cannot do so without the consent of his tenant. In such a case the mineral must remain ungotten until that consent is obtained. The copyholder cannot get it, because he has no title to it; the lord cannot get it, because he has no right to enter upon the land of his tenant. But the question in this case is, not whether the duke, or those representing him, have the right to go over the land and do damage to the surface, but whether the property in the mineral is in the lord. This appears to me to throw out of

the case almost, if not quite, all the evidence offered to you on behalf of the plaintiff, to prove what were called interruptions in the working of the mines, and purchases of the land by lessees of the copper. The whole of this evidence is explained by the circumstance that the surface was in the possession of agricultural tenants, and that means had not been taken to obtain their consent to enter upon the land. In all or most of the leases granted by the Crown, it is specially provided that the lessee of the minerals shall not enter on the land of the duke's tenant until he has made an agreement with him for that purpose. Such a special provision was wholly unnecessary; for it is quite clear that in law he would have no right to enter on the land to work a mine, although the mine might be his property. This appears to me to account for all the evidence which has been given as to the interruptions and the purchases, and to take away the effect of the argument addressed to you by the learned counsel for the plaintiff upon this point.

Having mentioned what the real question is, I will now state in what point of view, under these circumstances, this question is presented for your consideration. You are aware, from the evidence which has been laid before you, that in these seventeen assessionable manors there is certain land known by the name of *duchy* land; that there is also in them, or in some of them, certain other land known by the name of *fee* land, which is land held in fee by the proprietor (*a*). Upon the land held in fee, neither the duke nor any other person but the owner of the fee has any right to minerals; that is a distinction which is perfectly familiar to all the persons who have been called before you, and seems to be well known and understood in the county of Cornwall. It appears by the evidence, that some time before any copper was raised in the tenement purchased by Mr. Rowe, and of which he was the equitable owner, a mine had been in work successfully, called Great Crinnis, and that about the time of his purchase, the East Crinnis mine, which was situated very

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(*a*) *Vide tamen ante*, 306, (*a*).

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near to the tenement of the plaintiff's testator, called Lamel-lyn, had also begun to be worked successfully. The plaintiff's testator purchased the tenement of Lamel-lyn in 1814. It has been proved in evidence, that in his opinion, and in the opinion of the person who sold the estate to him, the right to the mineral was in the duke. This is an argument applying rather to the impression of the individual than to the subject-matter of the cause. It is, however, an argument that is not undeserving of your consideration, because in the determination of a dispute it is always worthwhile to see how the question has arisen, and what was the opinion of the party by whom it is agitated, at a time antecedent to that at which he has thought fit to raise it; for the change of opinion throws upon him the burthen of shewing that some new information has reached him which has corrected his error. We have learned from the evidence, that some few years after the purchase, the testator engaged a person of the name of Barberry, who had worked in the East Crinnis mine, and employed him to sink, within the property he had purchased, a shaft, which dipped down precisely on the lode on which the East Crinnis adventurers were working, and that afterwards he sunk another shaft, from whence the copper forming the subject of the present inquiry was raised.

It has been alleged, on behalf of the plaintiff, that from some ancient documents in the time of King *Edward* the First, which have been produced, it must be inferred that that which was afterwards represented as duchy land, or conventional land, was antecedently to that period held in fee simple. If that be made out there will be an end to the cause; but the evidence on which that proposition is endeavoured to be established is this, and this only, that in certain accounts delivered in the time of *Edward* the First, one by the sheriff of Cornwall, and others by other persons appointed to receive the revenues, (these accounts being a summary only of what they had received, and not a detail of the particular sums, and the sources from which those particular sums were derived,)

there is mentioned the receipt of a sum of about 25*l.*, a sum considerably greater than the rents which those acknowledged to be lands held in fee simple are found to yield; and inasmuch as those persons have called the whole "rents of assize," you are desired to infer that this sum must have included, as rents of assize, the payments made by those who are afterwards represented as holding by convention. Very little weight is to be given to the phrase "rent of assize," when used by persons of this description. As one proof of this, we find an instance in which they speak of the rent of assize of natives of stock; now natives of stock were the purest and most absolute bondmen; they were entirely subject to the will of their lord, were subject to being placed in any tenement in which he might think fit to place them, and were compellable to do for him any work he might call upon them to do and to pay, as appears here in this evidence under the head of chevage (*a*), a sort of capitation tax, when they were employed elsewhere than on the lord's service; in short, they were as much his absolute slaves and servants as persons now are in any part of the world where slavery exists. Happily in this country this species of tenure has long ceased; but it is absolutely impossible that payments by natives of stock could be denominated rents of assize in strict legal acceptation as we now understand that term. It is obvious, therefore, that the term was used only in a popular and general sense, to denominate all the rents that were paid. It appears, however, by an instrument proved on the part of the defendant, a receiver's account as early as 25 *Edw.* 1, (*b*) that during that very period to which those documents referred, in which conventional tenants are mentioned, the officer answers for 25*l.* for what are called rents of assize. In this he appears to have included together the rents of those persons who were conventional tenants, and those of the description which I before mentioned. He also mentions that he did account for 31*s.*, "for forty-six acres of waste at Wallan, let

(*a*) *Ante*, 151, (*a*).      (*b*) *Ante*, 163; Mann. Exch. Pract. 2d ed. 371.

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to farm for a term of six years, (this being the fourth,) and for 6s. for nine acres of the same land, let to farm as long as they will bear corn." Then I think the fees and perquisites of courts are mentioned. Then he accounts for 4s. "of Paschas of Nansmellyn, for that he might hold his land for the term of ten years, as he before held, this being the first year." (a) He further accounts "for 2s. 6d. received of Henry of Nansmellyn, and his five fellows, for farlieu (b) and default; and for 6s. 8d. of Henry of Nansmellyn for having his land again, which he had before surrendered, and for 4s. for the manor of Tewynton for concealment, and for 3s. 4d. for the chattels of John Porteyn, a conventionary, deceased." In this document, therefore, which is of an earlier date than those laid before you on behalf of the plaintiff, you find mention made of conventionary tenants and land let in convention. The next document in which these are mentioned, is the inquest (c) taken after the death of Earl Edmund, in the 29 *Edw. 1*, (d) a date antecedent to the time of those ministers' and sheriffs' accounts, in which the rents of assize are mentioned altogether. That was an inquisition usually taken at that time, and for some centuries

(a) The rendering of accounts in this form is not peculiar to Cornwall. In the pipe roll of the Bishop of Winchester's manor of Taunton Deane, *temp. Edw. 4*, and in many of the preceding pipe rolls, purporting to be the accounts of the reeves of the several hundreds, into which the manor is divided, under the head of "Farm," we find the following entry:

"And of 6s. 8d. for a fine for the pasture and underwood of the new park of Corfe, demised to John Babb, by grant of the steward, for the term of twenty years, (*Vide 19 Ass. fo. 64, pl. 9.*) this year being the second; and yet he is to pay a rent per annum of 1*l.* 3*s.* 4*d.*"

The occurrence of the same formula in these totally unconnected districts, seems to indicate that this was an ordinary mode of accounting.

(b) "Farlieu is money paid by tenants in the west of England in lieu of heriot; and in some manors in Devonshire farlieu is distinguished to be the best goods; as heriot is the best beast, payable at the death of a tenant." *Cowell.*

(c) *Ante*, 151.

(d) Earl Edmund died 28 *Edw. 1*. As to the earldom and dukedom of Cornwall, and the origin of the duchy tenures, see Mann. *Exch. Pract.* 357; and for the series of earls and dukes, see *ibid.* 493.

afterwards, on the death of any person who died seised of considerable property(a); and it is desirable you should observe the description contained in this document of the manor of Tewington. The jurors find, (for this is found by a jury,) with respect to the manor of Tewington, among other things, that "there are two water mills, a fishery which is worth so much, that the fine of tin is worth by the year 6s., and there are there forty-eight free tenants, who render by the year for a certain rent and their works 8*l.* 9s. 4½*d.*, at the four principal terms of the year; and there are there forty-three conventionary tenants, who hold fifteen acres and a sixth part of one ferling of land Cornish, and render by the year, at the four principal terms, for certain rent, works, and stannary fines (b), 13*l.* 11s. 2*d.*; and there are eleven villeins." Now if you put these sums together, and 4*l.* for another purpose, they will not quite agree with the rents of assize, as stated by the counsel of the plaintiff; but they do agree very nearly; and they prove that the rents of assize in the ministers' accounts must have been composed of these several items, as there are no other issues of the manor to which they are applicable. The trifling variation in the amounts may be accounted for by the circumstance, that the person called upon to account will not have received precisely the same sum, for the tenant may not have paid one half year when due, and thus they may have received money which became due in the previous half year.

(a) 2 Bla. Comm. 68.

"In cases of inquisitions *post mortem*, and such private offices, you cannot read the return without also reading the commission; but in cases of more general concern, such as the ministers' return to the commission in Henry the 8th's time, to inquire into the value of livings, it would be of ill consequence to oblige the parties to take copies of the whole record, and the commission is a thing of such public notoriety, that it requires no proof. Per *Hardwicke*,

C. in Sir *Hugh Smithson's* case. Bull. N. P. 228. So in 12 Vin. Abr. 120, *Evidence* (A. b. 42,) pl. 2, "an inquisition was not admitted to be read in evidence, on the ground that there was no commission to warrant it. Jan. 23, 1707. MSS. Tab. *Austin v. Nicholls*." But in pl. 3, Viner states that "an old inquisition *post mortem* was read as evidence, without producing the commission. MSS. Tab. Feb. 6, 1726. *Anderton v. Magawly*." Et vide ante, 171, (a).

(b) i. e. fines of tin.

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In this inquisition mention is made of the fine of tin in Tewington, as being worth by the year 6s. In some of the later documents, fines of tin of free and native conventionaries are mentioned as being worth 21s. I may here observe, that it is very difficult at the present day to understand what is meant by the fine of tin (*a*). It appears to have been something distinct from toll (*b*); but whatever it was, it has ceased some hundred years. The last document in which the fine of tin is mentioned as payable by conventional tenants as a sum fixed and certain, or as being payable by them at all, is in the reign of King Edward the Third (*c*); and there is not after that period any one account of any minister or receiver which fixes the payment of fine of tin distinctly upon conventional tenants. There is a payment of 20s. a year spoken of (*d*), which, perhaps, cannot be well accounted for otherwise than by supposing that some of it had been received from this class of tenants; but it was never received as fine of tin, and under that name, from that period; and it has certainly ceased to be received at all for a very long time.

The next document (*e*) in point of antiquity was the Assession Roll, 7 *Edw. 3.* (*f*) This is prior to the constitution of the duchy, (which was in the 11 *Edw. 3.*) and at this time the county of Cornwall was vested in Prince John, whom the king had created earl. This document purports to give us the real character of conventional tenants, of whom the plaintiff's testator, Mr. Rowe, or his *cestui que trust*, is one. And if it truly describe the character of those tenants, there is an end of this cause, for then they are tenants only from seven years to seven years. It is important, therefore, to direct your attention particularly to the contents of this Assession Roll. It appears to have been taken under a commission issued by Prince John, directed to several commissioners, and it is in the form which

(*a*) *Ante*, 163, 316.

(*b*) *Ante*, 163, 200, 231, 257.

(*c*) *Ante*, 162, 192.

(*d*) *Ante*, 163, 314, 6, 8, 9.

(*e*) *Ante*, 179.

(*f*) 1333.

was used at that period of time in such cases (a). It recites thus, "Whereas many of our tenants of our seignior of Cornwall have long holden, and do yet hold in divers manors, great part of our demesne (b) lands" (that is, the prince's own land) "in convention, rendering for the same lands certain rents by the year, and their terms only expire at the feast of St. Michael next coming, as is and ought to be known in the county; and for as much as we have the power without doing wrong to any one, to retake our said lands into our own hands, and make thereof our profit, which may, perhaps, turn to the injury and damage of our said tenants; nevertheless, we will for their ease that they may henceforth hold by new covenant the same lands in convention, so that they always render to us the true value thereof in manner as between them and our ministers whom we have sent thither for this purpose may be agreed;" and, therefore, the earl directs them to assess the lands. Assessment (c) means arrenting or assessing them; "we have appointed attorneys," naming them, "to assess our lands aforesaid, and to let them in conventions by indentures or inolments for term of life, lives, or for years, according as it shall seem to them for the good of our said tenants, who now held our same lands, or in default, to others who will give us more, and as shall be most for our profit." And then the commissioners recite, that by virtue of that commission they have assessed all the lands within written for seven years next after the said feast of St. Michael, except the land which the natives held in villenage as of stock, which they do not let. Then it goes on to mention free conventionaries. Now we do not find in this or in any other Assessment Roll any mention made of the free tenants; and for this plain reason, that the commissioners were to let the prince's lands, and had nothing to do with lands holden in fee, which would of course be under no lease. They begin with free conventionaries, and under this head they first describe

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(a) Mann. Exch. Pract. 2d edit. 372 (d). (b) Ibid. 371. (c) Ib. 372.

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the holding of a person called Nicholas Wysa (a). "Nicholas Wysa hath taken one messuage seven acres of land, in one ferling of land, which the same Nicholas before held, and holds in Merthyn; To hold in convention from the feast of St. Michael next following after the date of this roll, unto the end of seven years next following, rendering therefore by the year, 7s. 9d. at the four terms and a certain rent called the fine of tin (b), suit, and other services, as before he was accustomed to do, and he gives to the lord for a fine 13s. 4d., and hath done fealty, &c." It goes on then to mention the other tenants; and, among others, it mentions the four tenants of Nansmellyn. A remark was made by the counsel for the plaintiff, that the rents of those conventional tenants had never varied, and that it is the character of rents of assize that they can never vary. Now in this document you will find instances of variation of rent in different places and at different times; but that which is most to our present purpose, is, that you will find an instance of a change of rent in the very tenements of Nansmellyn, one of which is the subject of the present cause; for you find here "Philip of Nansmellyn hath taken one messuage, 11 acres English, in half an acre Cornish, which the same holds in Nansmellyn; To hold in convention, as above, rendering therefore by the year 11s. at the four terms thereof, whereof of new increase 2s. 6d.," that is, that he paid 11s., being 2s. 6d. more than he had formerly paid. "John of Nansmellyn hath taken one messuage 11 acres of land English, in half an acre of land Cornish, which the same holds in Nansmellyn; To hold in convention, rendering therefore by the year 11s., at the four terms, whereof of new increase 2s. 6d. suit and other, &c., and he gives to the lord for a fine 20s." Now this is in the 7th of *Edw. 3.* (c) We have an extent of the manor (d), and an account of it taken in the 1st of *Edw. 3.* (e) and there you find the rent of those four tenements

(a) *Ante*, 181.

(b) Here the payment of fine of tin is expressly annexed to a conventional tenement.

(c) 1333.

(d) *Ante*, 164.

(e) 1327.

mentioned at 8s. 6d.; here it is raised to 11s.; and in all the documents subsequent to this period it stands at 11s.; therefore, before the creation of the duchy there is a change of the rent of this very land of Nansmellyn, which is utterly inconsistent with the notion that that land was free. Mention is then made of those tenements which were not let, the mill of Wallan and others; and it appears afterwards by the ministers' accounts that they were subsequently let, and the rent for them is duly accounted for. In several of the later rolls tenements are specified as not let, but which appear to have been let before the next Assession; the ministers' account for the intermediate time stating the rent as received. Previously to this first Assession Roll, there was an extent of the manor in 1 *Edw.* 3, which is an account of the lands in the manor of Tewington. It begins with naming all the tenants who held in fee; thus, "William of Bodrugan (a) holds seven acres of land in Tregrean, and

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(a) As to the submanor of Tregrean, and the conventional tenants there, see Mann. Exch. Pract. 2d edit. 372, 384 (2); and see further as to the Bodrugans, *ib.* 394 (o). From the *Calendarium Inquisitionum post mortem*, (1 vol. 233,) it would appear that Henry de Bodrugan held the "manor of Tregeryen" and the "manor of Tewynton" in 2 *Edw.* 2, when they came to the Crown by escheat, and that afterwards, upon the forfeiture of "Thomas, Earl of Lancaster, and other rebels," in 15 *Edw.* 2, these manors again escheated to the king. (*ib.* 301.)

It seems difficult to understand how the manor of Tregrean could be held, together with the manor of Tewington, without a merger. If this merger did take place it would, however, be competent to the Crown to re-create the manor of Tregrean by granting the demesnes

and services of Tregrean, *tenendum ut de manerio de Tewington*; or the king's grantee of the manor of Tewington might create or revive the submanor at any time before the statute *de prerogativa Regis* (17 *Edw.* 2,) or, by the king's licence, after that statute; for though it is commonly said that a manor cannot be created at the present day, that proposition appears not to be true in point of law, unless we add the qualification "without the consent of the lords mediate and immediate." The effect of the statutes of *quia emptores* and *prerogativa Regis*, is to restrict, and, for all practical purposes, to take away the power of creating *de novo* a tenure in fee under the *feoffor*, and thereby indirectly to prevent the creation of a new mesne seignior, whether appendant, (in modern language a *manor*,) or in gross. Here, however, the defen-

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renders annually at the four terms in equal portions, 18s. 6½d. and for fine of tin so much." The other entries of free tenants then follow in order, with their rents and fines of tin annexed. At the end of the free tenants, their rents are thus summed up:—"Sum of the whole rents of free tenants 7l. 16s. 1½d.," besides fines of tin. It appears that that makes 8l. 10s. 4½d. together with 14s. 3½d. for fines of tin. Then follow the free conventionaries, not describing the nature of their tenure but merely naming them in this way, "Amicia Matheu de Kestelgothen holds there one ferling and a half, and renders annually 7s. and does suit." Nothing is said about fine of tin or the nature of their holding; but they are merely described as "free conventionaries." "John de Nansmellyn holds ½ an acre of land and renders annually 8s. 6d." In the 7th of *Edw. 3*, that was raised to 11s. "Philip of the same, 8s. 6d. Gregory of the same, 8s. 6d." These rents are afterwards raised to 11s., as appears in the Assession Roll of the 7th of *Edw. 3*. There is then "sum of conventionaries, 16l. 4s. 0½d." Then follow the natives, who are said to hold half a ferling at certain rents; and in this extent, natives of stock are not distinguished from the other natives. In the early Assession Roll first referred to, they are distinguished, and after free conventionaries there are native conventionaries, who are said to take for seven years. Afterwards natives of stock are mentioned, and they are not said to take, for no bargain is made with them, and therefore they are only said to hold. Then follow in regular series, with some interruptions, as might naturally be expected, assessions until as late as the time of Queen *Elizabeth (a)*. Since that time, these assession rolls have been continued down to the present time, not at the regular period of seven years, but nearly so, and in every one of these documents the conventional tenant is said to take his tenement in free convention for

dant's case seems to rest upon a denial of any seisin *in fee* in the customary tenant.

by an attempt in that reign to destroy the customary tenure, Carew's Survey of Cornwall, 37.

(a) See the ferment occasioned

seven years from Michaelmas. To many of those Assession Rolls the commissions are annexed, which authorise the commissioners to let for life, lives, or for years(a); I believe that the later ones enable them only to let for seven years. Looking at that part of the evidence only, these tenants are merely leaseholders for seven years, without any power at all of renewing their tenure. If they were merely leaseholders for seven years, at the time of the constitution of the duchy in the 11th of *Edw. 3*, if that was their true character at that time, they can have no title to the minerals; for they had originally no title to them, and nothing which has been done since can alter the nature of the tenure or their rights as connected with their tenure; and taking the whole of the evidence on this subject together, as at present advised, it appears to me that if a court of law were called upon to pronounce an opinion upon the rights of these tenants, they would say, that although they were leaseholders from seven years to seven years, and were bound at the end of every seven years to come and acknowledge their tenure, and to pay their rents and fines regularly to the lord, still they have superadded, in an unusual manner, to that character of tenants from seven years to seven years, the right of haying at the conclusion of the term the tenement re-granted to the tenant himself, or, in case of his death, to his heir; or, in the intervening period of time, to any person he may appoint(b). The fair conclusion to be drawn from the whole of the evidence is, that they are, according to the language used by themselves in some of the documents(c), tenants from seven years to seven years with a right of renewal and a right of descent to their heirs and to their widows in case of death(d).

(a) *Ibid.*, 180, 197.

(b) *Post*, 355.

(c) Carew says, writing in 1602, "There are seuteene Mannours, appertaining to the Duchie of Cornwall, who doe everie seuenth yere take their *holdings*, (so they terme them,) of certain Commissioners sent for the purpose, and have con-

tinued this use for the best part of three hundred yeeres through which they reckon a kind of inheritable estate accrued vnto them." Carew's Survey of Cornwall, 36, b.

(d) *Vide Greenhill v. Greenhill*, 2 Vern. 679, as to *devises* of conventional estates.

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But if that be their character, they cannot be entitled to minerals; for the minerals can belong only to the owner of the soil. The right to the minerals cannot be in a leaseholder from seven years to seven years, though he may have superadded, in a very unusual manner, the right to have his tenement re-granted to him at the conclusion of the seven years.

It is very difficult to say at what period any acts began to be done by the steward or deputy steward or receiver, at any interval between the holding of the regular Assession Courts relative to the duchy tenants (*a*). It is very difficult upon this evidence to say not only when but how the practice began. The earliest document which shews any thing done at any intermediate court, or by any intermediate authority between holding of the assession courts, is that in the reign of *Henry 8*. That has been followed up since by a great many other documents, by which it appears to have long been an established custom, or at least an established usage, in all these manors to allow the tenant, if he has occasion to sell his tenement in the interval between the seven years, to apply to the steward at the intervening court, and afterwards at the lord's regular court, to accept his surrender and to admit his purchaser in his stead. According to the evidence of Mr. Coode (*b*), they get two friends of the parties to come together before the steward, and at the court thus formed they have been allowed to convey their tenements for money or any other consideration; but the very form in which this is done at the present day is an acknowledgment that the lord must interpose to give validity to the transfer; for the form is a surrender by the old tenant into the hands of the lord, in order that the lord may grant out the tenement to the new tenant, as is done in the case of copyholds; and in all the documents, more especially those of a modern date, you find it mentioned, as a part of the contract, that the new tenant undertakes to keep the tene-

(*a*) As to these inter-assessional courts, *vide* Mann. Exch. Pract. 2d edit. 380.

(*b*) *Ante*, 281.

ment in repair. I believe no instance can be found in which a tenant in fee, or a person having any interest which can be deemed to be in the nature of a fee, has put himself under an obligation to the lord to repair his tenement. It may possibly happen for the purpose mentioned by Mr. *Brougham* (a), to secure to the lord his quit rent; but I am not aware of any instance in which that has been done.

This then appears to be the character of the tenure. As I said before, it is very difficult to say how and when the practice to which I have referred was introduced; it cannot have begun by any usurpation on the part of the duke; it may have originated, I will not say in an usurpation of the tenants, but in a desire on their part to make the most of the value of their estates, by giving to them as great permanence as they could. This would meet with a ready acquiescence on the part of the stewards residing in the country, who would be apt rather to assist their friends and neighbours than to confine themselves strictly to their duties. This view of the character of the tenure is confirmed by a survey taken under the parliamentary commission in the year 1650 (b), which is a very elaborate survey of the whole of these manors. It begins with "A survey of the manor of Tewington, with the rights, members, and appurtenances thereof." It mentions singly all the free tenants. Against the name of each are placed the extent of his holding, his rent per annum, and his fine of tin per annum. The amount is then cast up, and it appears that the sum total is 8*l.* 13*s.* 3*d.* The next class are the conventional tenants, whose tenure is the subject of the present inquiry, and they are thus described; "Oliver Saule, Esq. by the death of Mary Saule, widow, holdeth in free conventional to him and his heirs for ever, from seven years to seven years, according to the custom of the manor, one messuage with the appurtenances in Towyn, for which he payeth per annum 8*s.*" Then it goes on through a great number of conventional tenants, having in the margin the

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(a) *Ante*, 335.

(b) *Ante*, 173.

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rent paid by each, but no mention is made of any fine of tin as paid by any of them. Then they speak of the pasture as having been taken in the name of all the tenants of certain towns, in the 19th of Queen *Eliz.* at 33s. 4d. to be held as their assessionary lands for seven years; and here "David Moyle is said to hold until the next assession only, and no longer, the pasture of Gwallen, Porthmellyn, and Towan, containing by estimation 360 acres." Oliver Saule, Esq. and Francis Scobel are stated to hold a certain parcel of waste land, with a wharf and quay thereon, until the next assession, and Francis Scobel is stated to hold a certain quarry of stone in Trenaren, until the next assession, at the rent of 20s.; and then there is this entry: "Memorandum, that we have certified the value of the toll tin of this manor in gross with other returns of the lease thereof, herewith sent up, and that the last assession of this manor was held the 11th September, 1645." Then they come to the customs of the manor, and they say, "There ought to be kept every seventh year an Assession Court for the said manor, unto which all the customary tenants are by their custom bound to repair, there to enter their claim and new take the several tenements and parts of tenements that they hold; not that their former titles to the same do then determine, it being by them held to them, their heirs and assigns for ever, according to the custom of the manor, but for that thereby divers advantages do or may accrue unto the lord." One of the advantages is stated to be, "that thereby the way of paying the lord rents and fines is duly kept and observed, which are paid as followeth (*viz.*) the whole rent and a sixth part of the fine and old knowledge money is paid every year, for the first six years after every assession year, and on the seventh year, or assession year, the rent only." Another is, "that thereby the lord shall also come to the knowledge of the present tenants, there being divers surrenders made within the space of seven years, the customary tenant having power in himself to divide and surrender away the whole or any part of the

tenement that he enjoyeth, to whom he pleaseth. For that by such surrenders, there accrueth unto the lord a new rent, called new knowledge." Then they state the value; afterwards that which is consistent with all the latter evidence that has been adduced, namely, that upon every assession, the old tenants pay what is called old knowledge money, and that any person who has had a tenement granted to him since the last assession pays a further sum, which is called new knowledge. This is another and a very strong admission of the right of the lord in respect of those conventional tenants. It appears further, that there ought to be viewers of reparations and a reeve chosen from among the customary tenants. The reeve continues to be chosen to this day, and I think there are viewers of reparations named, but who, for a reason which we can very easily understand, seem never to do any thing.

With respect to the degree of credit to be attributed to the parliamentary survey, I can only say that it has been always considered in Courts as a record of very great authenticity. It is supposed to have been taken with very great care and attention; and the object of taking it, in this instance at least, whatever other object there might be, was to enable the Commonwealth, who were about to sell the manors, to know what sum they should charge for them; and to enable the purchaser to form a judgment respecting their value, and know what sum to give for them; a document taken under such sanction, and with such views as these, is surely entitled to great weight; and there the tenure of these conventional tenants is described as being to them and their heirs in free convention from seven years to seven years. Such is the language of the parliamentary commissioners; but what is the language of the tenants themselves? You have a memorial presented in the year 1633 by the tenants of this very manor of Tewington, and it is in these words:—[his lordship then read the memorial (a).] Here the tenants themselves state

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(a) *Ante*, 177.

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what their right is; that they held their customary tenures to them and their heirs from seven years to seven years, and that they are bound to go to their lord's court at the expiration of that time. And these memorials appear to have been made under an apprehension lest, in default of the assession court being held at the regular period, the tenants might derive some injury or inconvenience; and, as no court has been held, they state what their custom is, and they pray that they may be considered having then tendered themselves, and offered to do that which, if the court had been held, it would have been their duty to do, that is, to new take their tenures. From one of the witnesses we have an account of the modern practice in this respect. We are told, that when the Assession is held it is the practice to summon the customary tenants to attend by themselves, or some person for them. The free tenants do not attend; and I do not see for what reason they should attend, as they could have nothing to do there. The customary tenants come and pay their old acknowledgment, and if there has been any surrender in the mean time, the new tenant comes and pays not only the old acknowledgment but the new one, which is dispersed over three years, the old acknowledgment or fine being dispersed over six years. It is impossible, after this evidence, to say that all this which passes in these Assession Courts is a matter passing behind their backs. They come and state in their memorial, as early as the time of *Charles I.* the situation in which they stand; they are perfectly cognizant, first and last, of all which is doing. There is very little evidence that a knowledge of what is done in the interval between the assessions is brought home to the Crown earlier than in the reign of *Henry the Eighth*; since that time the stewards appear to have sent extracts of fines, that is, sums received by them in the intervals and the new surrenders, to the officers of the duchy; so that the officers of the duchy have had notice of the inter-assessional proceedings from the time of *Henry 8*; but before that time they appear, so far as we know, to have been left in the

dark as to all that was done by the stewards in this interval. Since that time, however, it appears that the Crown had knowledge of the stewards' acts in the interval, and fully acquiesced in them.

Upon a review of the whole of the evidence in this case, I have no difficulty in saying, as at present advised, however difficult it may be to account for every peculiarity of a usage which has prevailed for so many years in this assessionable manor, yet that that usage cannot now be disturbed; but that those tenants must still be considered to be that which they have called themselves in former times, namely, persons holding from seven years to seven years, with a right to a renewal at the end of the seven years; and that any tenant passing away his tenement in the mean time would have a right to require of the Duke of Cornwall, that the person to whom he assigned his interest should be admitted (a). I should say upon the evidence, that such a right would be established by usage, though it is difficult to trace its origin. I do not see that there is any reason to apprehend that the right to hold to them and their heirs will be ever questioned; and I think I may say with confidence, that if it is, it will never be questioned with effect; but that these conventional tenants, having an estate from seven years to seven years, with something superadded to that estate which has grown up ever since the constitution of the duchy, or perhaps before, have the right to come again at the end of every seven years, and, upon payment of their acknowledgment, to retake their estate. Whether it follows from thence that they have a right to the minerals, is quite another question. If a clear and distinct and positive usage were proved affirmatively on behalf of those tenants, I do not say that such a usage may not be valid in law; but this I say, and I believe I have the sanction of both my learned brothers (b), who are here, and I have the sanction of my learned brother who is absent (c) for saying, that in order to entitle a

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The conventional tenants within the assessionable manors of the duchy of Cornwall have a perpetual indefeasible right to them and their customary heirs and surrenderees, to renew their estate from seven years to seven years.

(a) *Ante*, 350. (b) *Bayley, J., and Parkc, J.* (c) *Littledale, J.*

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tenant of this very peculiar description to minerals which do not upon any reasonable presumption belong to him, the burthen is cast upon him to prove that he has a right to take them; and unless the tenant can shew the right to be in him, the right must remain where by law it would be vested, namely, in the lord.

Then supposing this to be an estate of the highest nature, which the plaintiff's counsel have contended for, have the tenants of this manor shewn any usage to take copper under their land? I have reviewed the evidence on the behalf of the plaintiff; I did so yesterday morning, and have done so again this morning; I went through it with considerable attention and great care, and I cannot find on the evidence one single undisputed instance of the profit of any mineral actually received by a conventional tenant. Tin, of course, is out of the question; indeed it is conceded, and if it were not, it was clearly proved, that where tin is gotten under a customary tenement, (whether bounded or not is quite immaterial, for the bounding does not relieve from the payment of the toll,) the toll is in all cases to be paid to the duke or his lessee. As to copper, there was considerable evidence of interruption to persons coming to sink shafts (*a*) and carry on works on the surface; and in some instances it was proved that the lessees have thought it worth while to pay a sum of money for the right to enter upon the land, in order that they might get the mineral. All that is material in this evidence goes to shew that the tenant has a right to say to his lord, "although the mineral belongs to you, you shall not enter to take it without my leave." That appears to me to be the extent of it. There was but one witness called on behalf of the plaintiff who spoke, in words, to the payment of any thing in the shape of dues or toll to the owner of a conventional tenement; that was an old man of 80, who said that money had been paid; and that he thought, and perhaps thought honestly, that it was paid for dues (*b*). But it turned out, on the examina-

(*a*) *Vide* Mann. Exch. Pract. 394 (*a*). (*b*) Treverden, *ante*, 293.

tion of that witness, that a great injury had been done to the surface, and therefore the probability was, that the money was paid, not for the toll of copper, but for the injury done to the surface. Pearce (*a*), a witness who spoke to the receipt of toll of copper for Sir William Lemon, says, "It is true I paid such a sum of money, but I paid it for the damage which had been done." That is an answer to the evidence of this witness.

Looking through the whole of the evidence as attentively as I have been able, and I hope as impartially as it was my duty as a Judge to do, I do feel myself bound to tell you that this is, in my opinion, the result of the evidence; that supposing there can be a right in a conventional tenant of this description by usage, (and it is by usage only, in point of law, he can have it,) the usage must be proved on behalf of the tenant; and the plaintiff, who claims as a conventional tenant, has wholly failed in proving it. You have had numerous instances of leases granted by the duchy, of mines of copper. You have some instances even from the witnesses who have been called on behalf of the plaintiff, amongst others from a witness of the name of Cocking (*b*), that where they worked on the land of conventional tenants, and dug for the copper, they paid not to the conventional tenant, but to the lessees of the duke, or person entitled under the duchy lease. I do not think the evidence to prove the payment to the lessees of the duke, when it comes to be sifted, is in every case applied to the conventional tenements. But on the other side there is nothing to meet it. It was incumbent upon the plaintiff, in order to establish his right, to prove distinctly that other persons standing in a similar situation had received the profits of the copper.

Some reliance has been placed on the cutting of timber and getting of slate from quarries (*c*). If that evidence be closely examined, I doubt whether it will be found that the right to the timber or to the slate quarries was in the conven-

(*a*) *Quare*.(*b*) *Ante*, 292.(*c*) *Ante*, 294.

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tionary tenants. But, even supposing this to be so, it does not at all follow that they have a right to the mines (*a*). One can very easily conceive, that at the great distance of this property from the personal superintendence of the officers whose duty it was to watch over the interests of the duchy, the tenants would occasionally take timber and open quarries without interruption; and that this would go on gradually, till at length they would venture to assert that they had a right. Reference was made upon that subject to answers in the time of Queen *Elizabeth*. At first the tenants appear to speak very faintly, they then get bolder and bolder (*b*); but whether they have it as their right or not, is a perfectly distinct question.

These are the circumstances of the case. You will consider them, and will say whether the view which is taken of the case by my learned brothers and by myself is, in your opinion, justified by the facts which have been proved before you. There is no further observation which I think it material to make. If there be any point on which either of my learned brothers considers further observation to be requisite, he will make it (*c*); for that is one of the advantages of this form of trial, where several Judges preside.

In a trial at bar each of the presiding Judges makes such observations to the jury upon the whole case, by way of direction, as he considers to be requisite.

My learned brothers have, I understand, taken the same view as I have done. I think there is very little doubt as to the facts of this case. You will decide upon them by your verdict.

The jury, after consulting together two or three minutes, returned a verdict for the defendant.

Lord TENTERDEN, C. J.—It is a very clear case. I have thought so for several days past. I am very happy to find you have taken the same view of it as I have (*d*).

(*a*) *Ante*, 309.

(*b*) See the progress of this claim, Mann. Exch. Pract. 339, (*y*).

(*c*) No such observations were

made by either of the learned Judges.

(*d*) The Appendix will be found at the end of this volume.



EDGE V. PARKER. (a)

1823.

**TRESPASS** for breaking and entering the plaintiff's house, and seizing his goods. Plea, not guilty. At the trial before *Park, J.*, at the spring assizes for the county of Stafford, in the year 1828 (b), the commission and proceedings were put in and proved. On the 6th October, 1827, defendant, as assignee of *Timothy Edge*, a bankrupt, entered the plaintiff's house, and seized goods which were the property of the bankrupt. The plaintiff is sued 25 January, 1828. It was objected, on behalf of the defendant, that by 6 Geo. 4, c. 16, s. 44, the action was commenced too late. The learned Judge overruled the objection, and a verdict was found for the plaintiff, damages 1s., for the entry, and for the defendant on the taking of the goods, the defendant having leave to move to enter a nonsuit. A rule *nisi* to that effect having accordingly been obtained in the following term,

An entry by assignees into the house of a third person, to take the goods of the bankrupt, is not "any thing done in pursuance of" 6 Geo. 4, c. 16, s. 44, so as to render it necessary that the action should be brought within three calendar months.

*Campbell* and *Curwood* now shewed cause. If, as the defendant seems to admit, he was bound to put in the commission and proceedings, he was bound to go further, and to give strict evidence to support the bankruptcy. The goods were seized by wrong, as the plaintiff alleges, and he brings his action against the party seizing. The case is not within the 92d sect., which has no clause in favour of defendants. Secondly, the 44th section does not extend to assignees claiming title to property. [*Parke, J.* No power is given by statute to the assignees to seize; they seize merely as having title. *Littledale, J.* The defendant does not do any thing under the act, but gets a title under it. The preceding sections relate to the commissioners.] It would be most mischievous if the right

(a) This and the following cases were argued before the Judges sitting under his Majesty's warrant, pursuant to 3 Geo. 4, c. 102.

(b) Counsel for the plaintiff, *Campbell* and *Curwood*; for the defendant, *R. V. Richards*.

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of property was bound by the lapse of so short a period. If the party is committed to gaol, he knows what the wrong is, and who it is that has wronged him; but it is otherwise with regard to property, where the injury, however clear, might not be known to the party injured until after three months had expired.

*Richards*, *contra*. The 44th section is general, and its protection is not confined to the commissioners and those acting under a warrant from them. The provision extends to every thing done in pursuance of the act. Then the assignees have seized for the purpose of making distribution *in pursuance of the act*. Nor is the protection of the statute limited to cases where the party is acting strictly in conformity with the statute. No protection is there required; and it would render the clause nugatory to put such a construction upon it. The corresponding provision of 24 Geo. 2, c. 44, s. 8, in favour of constables, has been held to extend to acts done *bonâ fide*, though exceeding the authority given by the warrant. *Parton v. Williams* (a), *Gaby v. Wilts Canal Company* (b), *Theobald v. Crichmore* (c), *Smith v. Wiltshire* (d). [*Bayley*, J. Is it the duty of the assignees to seize? the messenger acting under the warrant of the commissioners is to seize. After that follows the assignment of the property from the commissioners to the assignees. Is it then the duty of the assignees to seize, or to seek their remedy by action? *Parke*, J. Ought they to seize where the rights are not quite clear? We did not demand the goods, the door was open and we walked in. [*Bayley*, J. It was the intention of the act to protect the messenger as well as the commissioners. *Littledale*, J. The 31st section contains a special provision as to bringing actions, so the 41st, 42d, and 43d. May not the 44th section be considered as forming a sweeping clause to the former? If the assignees were bound to seize in order to distribute, it

(a) 3 B. & A. 330.

(b) 3 M. & S. 580.

(c) 1 B. & A. 227.

(d) 2 Brod. & Bingham 619.

might perhaps be within the act. The goods may be removed, and the party may not be worth suing. One does not see why the commissioners are to be more protected than the assignees in plain common sense.]

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BAYLEY, J.—In this case the goods were in the plaintiff's house, and the only question is, whether the defendant, being assignee of a bankrupt, was protected by 6 Geo. 4, c. 16, s. 44; or, in other words, whether the act complained of was done in pursuance of that act, by which is to be understood, not in strict conformity with the provisions of the statute, for in that case no protection would be necessary, but where the party appears to act under the statute. The act contains a clause for levying goods, and the 27th section provides; it does not give a power to break open all places where the bankrupt's property is reputed to be. Then comes the clause as to the *houses* of other persons. The subsequent part gives a power to the commissioners to put questions and commit. Then follow provisions requiring notice of actions and tender of amends, which clauses apply to actions brought against the commissioners. There must be a demand of copy of the warrant, I think. Then comes the clause in question, which requires that every action brought against any person for any thing done in pursuance of the act, shall be commenced within three months after the fact committed. Upon which the question arises, whether the act was done by the assignees in pursuance of the statute. The statute gives no express power to the assignee to enter. It directs the property to be assigned, and clothes the assignee with the rights of an owner. The ownership is given by the act, but the assignee does not seize by virtue of the act, which is wholly silent as to seizure; it leaves him to exercise his own judgment. Upon the construction contended for by the plaintiff, one consequence would be this, that if the owner were a foreigner, having no agent in England, the property would be lost. If the assignees take a step which the act

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directs, they may be said to be acting in pursuance of the act: but here they act in the character of owners, and not in pursuance of the statute. We are furnished with the decision of the Court of Common Pleas in *Carruthers v. Payne* (a). The Court took time to consider the point, and the majority of the Court were of opinion that the seizure by the assignees was not an act done in pursuance of the statute.

LITLEDALE, J.—I am of the same opinion. From the position of the 44th section it may have been understood to refer only to the persons mentioned before. I do not think that can be exactly said, because the position may be varied. The question rests as upon 1 *Jac.* 1, c. 15. Assignees have often sheltered themselves by a general form of pleading, accompanied with a special plea. The act directs commissioners and messengers to do particular things. It is different with respect to assignees. Other acts were necessarily to be done immediately. It was an object to get the goods as soon as possible into the hands of the messenger. It may be said that it is the duty of the assignees to make distribution, and that that can be done only in one of three ways; but as the act gives no power to seize, his right to seize must arise from the property in the goods which is vested in him. It may be said to be very hard that an assignee should be liable to an action at the end of five or six years: but he may protect himself by making a special return. On the other hand, it is hard upon the subjects at large to be restricted in the assertion of their rights.

PARKE, J.—The 44th section applies where a special power is given by the statute, not where parties act upon a common law right.

Rule discharged.

(a) 5 Bingh. 270; 2 M. & P. 429.

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## The KING v. The Inhabitants of LEW.

UPON appeal against an order of two justices, whereby *William Purbrick*, his wife and children, were removed from the township of Charlbury to the hamlet of Lew, in the county of Oxford, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

*Purbrick*, the pauper, being settled in the hamlet of Lew, was, on the 16th day of October, 1826, duly elected by the inhabitants of the township of Charlbury, in vestry assembled, to be an assistant overseer of the poor of the said township, in pursuance of the statute 59 Geo. 3, c. 12, s. 7. The vestry determined that the pauper should perform the duties and receive the salary mentioned in the warrant of appointment hereinafter set forth. On the 18th of the same month he was appointed such assistant overseer by the following warrant, under the hands and seals of two justices (a):—"The township of Charlbury, in the county of Oxford, to wit. Whereas the inhabitants of the township of Charlbury, in the county of Oxford, in vestry assembled in the said township on the 17th day of October, 1826, did nominate and elect *W. Purbrick*, of the township aforesaid, to be an assistant overseer of the poor of the said township, and did fix the yearly sum of 10*l.* as and for the yearly salary of the said *W. Purbrick*, for the execution of the said office: Now we, two of his Majesty's justices of the peace in and for the said township, and in pursuance of the statute in such case made and provided, do hereby appoint the said *W. Purbrick* to be an assistant overseer of the poor of the said township; and we do hereby authorize and empower him to execute and perform the said duties, and to receive the said salary so as aforesaid fixed by the said inhabitants in their said vestry." This warrant of appointment was not stamped. The pauper

The office of assistant overseer, under 59 Geo. 3, c. 12, is a public annual officer within 3 and 4 W. & M. c. 11, s. 6.

If a salary be annexed to the office, the appointment requires a stamp, under 55 Geo. 4, c. 184; and service of the office for a year under an unstamped appointment, confers no settlement.

(a) Query, as to the necessity of producing the appointment.

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duly performed the duties of assistant overseer, by virtue of the aforesaid appointment, for one whole year from the date thereof, and resided, during that time, in the township of Charlbury. The sessions were of opinion that the warrant of appointment under the hands and seals of two justices did not require any stamp, and they therefore received it in evidence; but they decided that no settlement was gained, subject to the opinion of the Court, first, whether the situation of assistant overseer, described in the warrant of appointment, was an office, the serving of which for a year would confer a settlement; and secondly, if the Court should be of opinion that it was such an office, whether the warrant of appointment, being in writing, required a stamp.

*Cooper*, in support of the order of sessions. In *The King v. Marsham (a)*, Lord *Ellenborough* says, that the office must be derived from the Crown. Here merely a power is given to the vestry to appoint, but is not compulsory on them. The appointment may be determined at any moment, under the 7th section of 59 *Geo. 3*, s. 12. In *The King v. Marsham*, the master of a workhouse, appointed under 9 *Geo. 1*, c. 7, was considered as not executing a public office or charge within 3 *W. & M.* c. 11, s. 6. [*Bayley, J.* *The King v. Ilminster* is a case more strongly in point. There the sessions found that the pauper was legally appointed governor of the workhouse in *A.* at an annual salary, and that the office of governor of the workhouse is a public annual office, and that the pauper served it for a year, it was held that a settlement was gained in *A. (b)*. *Littledale, J.* The word office is used two or three times in the act. *Bayley, J.* Is a hog-ringer an annual office? It has been held to be within the statute (c). *Parke, J.* There is a case which shews that the statute of *William* extends to offices subsequently created, as a col-

(a) 7 East, 167; 3 Smith, 151. (c) *Rex v. Whittlesea*, 4 T. R. 807.

(b) 1 East, 83.

lector of duties on births and burials. It becomes an office when the vestry have appointed (a).] It is submitted that this was not an annual office. [*Littledale, J.* Is it contended that an annual salary does not make the office annual?] The term "annual" must be understood to mean "by the year," and not "for a year." It has been held that the curate of a sequestered living gains no settlement. *The King v. Over* (b). [*Bayley, J.* There the curate could only be appointed for the time that the living might happen to be under sequestration.] The curate, like the assistant overseer, is appointed with an annual stipend. [*Parke, J.* This is an annual office by the express words of the statute, unless it be determined.] The question is, whether this was an annual office at the time of the appointment. [*Littledale, J.* Many yearly hirings depend upon the will of the parties. *Bayley, J.* A general hiring, subject to being determined by monthly warning, is a yearly hiring.] Another objection is, that this office was not executed by the pauper for himself. No settlement can be gained by being the deputy of an officer. *The King v. Allcannings* (c). Here the pauper was nothing more nor less than a deputy. It will not be contended that it is competent to an assistant overseer to execute a certificate. The appointment is bad for not stating the duties to be performed by the assistant overseer. *Bennett v. Edwards* (d). [*Bayley, J.* There the Court said, that the form of the appointment not being stated, they could not see what the duties of the office were.] The last objection is, that the warrant was not stamped. By 55 Geo. 3, c. 184, schedule, part 2, title Grant, any grant or appointment by his Majesty, his heirs or successors, or by any other person or persons, of or to any office or employment, by letters-patent, deed or other writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l. per annum*, requires a stamp of 2*l.* It is

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(a) *Rex v. Birham*, 2 Bott,  
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(b) Burr. S. C. 746.

(c) Burr. S. C. 634.

(d) *Ante*, vol. ii. 482; 8 B. & C.  
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impossible to get out of these words, which are very large. It was contended below that a permanent appointment only requires a stamp, and that the appointment of assistant overseer was not a permanent appointment. If this be so, the case is stronger upon the other part of the argument, namely, that this is a precarious, not an annual office.

*Chilton* (with whom was *Taunton*) was directed by *Bayley*, J., to confine himself to the objection upon the stamp. The pauper actually served the office, even if it be considered that the appointment was informal. [*Bayley*, J. Suppose the case had stated that the pauper had been duly elected, but that the magistrates had not appointed, would that have done?] But this is not such an office as requires a stamp to the appointment. The mention of letters-patent shews the class of appointments which were meant to be subjected to a stamp duty. It never could be the intention of the legislature to include parish offices, and thus devote the money raised for the relief of the poor to another purpose; nor indeed was the office in question in existence at the time of the passing of the last stamp act.

BAYLEY, J.—I am of opinion that the pauper held a public office or charge within the meaning of 3 and 4 *W.&M.* c. 11. This is a public office. It is to be exercised co-extensively with the parish, and the officer is to be nominated at a public vestry. Then is it an annual office? He is to have a yearly salary, and therefore, though he may be removed, he is an annual officer. He is not appointed in the place of any particular officer, subject to a determination of his authority when that officer resumes his functions. There are many cases to shew that this must be considered as an annual office, notwithstanding that it was in the power of the officer to resign, and of the parish, in vestry assembled, to remove. My difficulty is in meeting the objection under the stamp act, which requires that any grant or appointment by his Majesty, or by any other person

*or persons*, of or to any office or employment, by letters-patent, deed or deeds, *or other writing*, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l. per annum*, shall have a stamp of 2*l.* Will that apply to cases where, upon the face of the appointment, it appears that the office wholly relates to the relief and maintenance of the poor? I cannot think that it was ever intended that such an appointment should be liable to the stamp duty, but I think that we are bound by the express words of the act. By 59 Geo. 3, c. 12, s. 7, the inhabitants of any parish in vestry assembled are authorized "to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants and vestry be thought fit; and it shall be lawful for any two of his Majesty's justices of the peace, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor, at such times and in such manner as shall have been agreed upon by the inhabitants in vestry; and the respective persons so to be appointed, and every person to be so appointed assistant overseer, shall be and is hereby authorized and empowered to execute all such the duties of the said office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor, until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer."

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LITLEDAL, J.—I am of the same opinion. I cannot

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get over the stamp act. At the end of the schedule there are several exemptions, and amongst these "all things relating to the poor" might have been inserted; but that is not done. Upon the other point I have no doubt. If an overseer is an officer, an assistant overseer is an officer. It is a public office, because it relates to the poor of a parish. It is an annual office, because it is to endure for a year, unless the party chooses to resign, or is called upon to resign. It was not meant that he should be considered as a deputy.

PARKE, J.—I am of the same opinion.

Order of Sessions confirmed.

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The KING v. The Inhabitants of ST. ANDREW the GREAT,  
 CAMBRIDGE.

When the Quarter Sessions confirm an order of removal, the validity of which turns upon a question of fact, that fact must be taken to have been found, although the evidence of the fact be stated in a case reserved; and this Court will not disturb such finding if there were any evidence from which the fact might be inferred.

UPON appeal against the order of two justices, whereby *Mary Anne Farrant*, single woman, was removed from the parish of Ely St. Mary, in the Isle of Ely, to the parish of St. Andrew the Great, in the town and county of Cambridge, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

It was proved that the pauper was hired to a Mrs. Furbank, as nursery-maid, in the parish of St. Andrew the Great in Cambridge, and lived there for five months; that she then went to Miss Henley, a straw-bonnet maker in the same parish, and asked her if she could give her work in her business; that Miss H. said she would for a fortnight or three weeks; that Miss H. did give her work for that time, two shillings a week and her board; that during this period the pauper lodged at her uncle's in another parish; that afterwards she went into Miss H.'s house, being told by Miss H. that she might sleep there, and that when she wanted clothes, she,

Miss H., would find them for her; that the pauper had her board but no wages; that after the pauper had thus come into the house to sleep, Miss H. told her that she might provide a place for herself elsewhere when she could, and that Miss H. repeated this two or three times during her stay; that soon after this the pauper went to visit her mother, who was ill in Ely, leaving some of her clothes behind her; that she asked Miss H.'s leave to go, and that Miss H. gave her some pocket money; that she stayed with her mother three weeks, and returned without any order from Miss H.; that she went a second time to see her mother, had leave for one week, but stayed three, and finally left Miss H. three weeks after her return; that she staid altogether about 15 months, did the household work, and after having done that went to the straw-bonnet work; and that during the time the pauper remained in the house Miss H. had no servant.

If the Court of King's Bench shall be of opinion that a settlement by hiring and service was gained in the parish of St. Andrew the Great under the above circumstances, both orders are to be confirmed; if the Court of King's Bench shall be of a contrary opinion, then both orders are to be quashed.

*Biggs Andrews*, in support of the order of sessions. The second contract was a general hiring. *The King v. Stockbridge* (a), *The King v. Worfield* (b). There the master applied to the servant, here the servant applies to the mistress. There is no other difference between the cases. *The King v. Long Whatton* (c) shews that a contract for a less period than a year preceding the general hiring is immaterial. "You may go" implies a controul over the servant. There are two recent cases connected with this subject, but they are distinguishable from the present. In

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THE GREAT,  
CAMBRIDGE.

(a) Burr. S. C. 759. (b) 5 T. R. 506. (c) 5 T. R. 447.

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*The King* against *Christ's Parish, York* (a), the hiring was as long as he chose to stop. In *The King* against *Great Bowden* (b), the hiring was considered insufficient, because the servant was at liberty to leave at any time. In that case *Bayley, J.* said that if it had been not so found, the Court would have said that it was a general hiring. The pauper served more than twelve months, from which a hiring may be implied, as the law implies a general hiring from the mere fact of service, and it lies upon the other side to shew that there are sufficient circumstances to prove that the hiring was not yearly. *The King v. Long Whatton* (c).

*Flannagan* and *Kelly*, contra. No express hiring for a year is found. An indefinite hiring might furnish ground for inferring a yearly hiring, but the Court of Quarter Sessions has not drawn that inference. Where there is no previous express contract, what the master said must be taken as descriptive of the contract.

BAYLEY, J.—The justices are to ascertain the facts and draw the proper conclusion. Here they have said that the hiring was for a year. We must see if there are premises from which this conclusion cannot be drawn. The first hiring was for a fortnight or three weeks. Then came the conversation with Miss Henley, in which the pauper is told that she may sleep in the house and shall be provided with clothes. If the servant is to receive clothes, it may be presumed that he is to remain in the service until he has earned his clothes. I think the justices had grounds for finding this to be an indefinite hiring. Miss Henley afterwards told her she might get a place elsewhere if she could. But that alone could not vary the already existing contract of general hiring. The leave of absence, if that leave was not contemporaneous with the original contract, could not

(a) 5 D. & R. 314; 3 B. & C. 459. (c) 5 T. R. 447.

(b) *Ade*, vol. i. 13; 7 B. & C. 245.

prevent an indefinite hiring. I cannot say the justices had no premises from which they could come to the conclusion that this was a yearly hiring; and if they had, it is not for this Court to enquire whether they have come to a proper conclusion or not.

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LITTLEDALE, J.—The Court of Quarter Sessions were the judges of the question of fact, whether or no there has been a yearly hiring. I cannot say they had not any premises from which this conclusion could have been drawn, though from the same premises I should have come to a contrary conclusion.

PARKE, J.—If it is not necessary for us to state what conclusion we should have come to if the case had been originally presented to us, it is enough to say, that the Court of Quarter Sessions was at liberty to draw the inference which has been drawn.

BAYLEY, J.—I wish the justices would exercise their own judgment upon matters of fact.

Order of Sessions confirmed (a).

(a) See the next case.

The KING v. The Inhabitants of ST. MARTIN, LEICESTER.

*FRANCIS WARD* and Mary his wife, and their four children, were removed from Great Bowden, in the county of Leicester, to St. Martin, Leicester; and upon appeal the Court of Quarter Sessions confirmed the order of removal, *A*, an inn-keeper, said to *B*. "I have a lad coming in a fortnight, but you may stay till he comes." *B*. was to have board, lodging, and vails. The other lad came but did not remain. *B*. continued in the service three years without anything further passing. The Court of Quarter Sessions is at liberty to infer a general hiring.

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subject to the opinion of this Court upon the following case:—

*Francis Ward*, the pauper, being then about fourteen years old, went in company with his father to the house of one *Neale*, an innkeeper, in the parish of St. Martin, Leicester, and stated to *Neale* that he had heard that he wanted a lad; *Neale* answered that he had a lad coming in a fortnight, but that the pauper might stay for that fortnight till the other lad came. The pauper was to fill the situation of boots and tap boy. He was to have his board and lodging in the house, and the vails which he might obtain in that employment. At the end of the fortnight the other lad came, but was not engaged by Mr. *Neale*, and the pauper continued in the service without any thing further passing between him and Mr. *Neale*, for a period of three years and a quarter, at the end of which time the pauper, hearing that the place of hostler at another inn was vacant, went and engaged it without consulting his master, and removed into it on the following day, *Neale* telling the pauper, that if it was his mind to go he believed he must. The Court of Quarter Sessions found that there was an implied hiring for a year.

*Denman* and *Reader*, in support of the order. There were no premises to warrant the conclusion to which the Quarter Sessions have come, but the propriety of which they have submitted to this Court. Unless service without any hiring be sufficient, this order cannot be supported. *The King v. Christ's Parish, York* (a). [*Bayley, J.* There it was part of the original bargain that the pauper was to stay as long as he pleased.] *The King v. Great Bowden* (b). [*Bayley, J.* In that case it was part of the original terms that the pauper should be at liberty to quit]. The same ground exists here. The Court has gone far enough in holding service to amount to a hiring, though a hiring may be reasonably inferred where the service is in husbandry.

(a) 5 D. & R. 314; 3 B. & C. 459.

(b) *Ante*, vol. i. 13.

Here the Court are in possession of the whole history of the transaction. The hiring was merely until another lad should come. There must be a contract of some sort or other. *Gregory-Stoke v. Pitminster* (a). There, besides four years' service, an actual retainer was proved, and the Court said that there must be an obligation to stay (b). In *The King v. Weyhill* (c) the words were, "Go into Ned Hill's place." Here it is not proved what the hiring of the former servant was. It is stated in the case that the pauper received vails; but that is consistent with either species of hiring. The master's saying that if the pauper had a mind to go he believed he must, shews that no contract existed under which the pauper was bound to stay. [Bayley, J. Supposing it had been said "Do you want a lad?" and the master had answered "I do," and he had gone into the service?] That would have been a general hiring; but here the answer would have been different; the term of the hiring would have been mentioned. In *The King v. Great Bowden* (d), it was said, "The one is bound to serve, the other to employ, (for a year.) If that is not the understanding, it is not a general hiring, but a hiring for a less period than a year." Here the understanding of the parties is shewn by their acts.

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*Jeremy*, contra, was stopped by the Court.

BAYLEY, J.—The Court of Quarter Sessions were warranted in coming to the conclusion they have come to. The pauper applied to the master to know whether he wanted a servant. If he had been then taken, and nothing had been said about the terms, or nothing more than what the law implied, it would have been a hiring for a year. The master gives a reason for making a temporary bargain. "I have another coming in a fortnight." The other lad comes, but he does not suit, and goes away. The pauper

(a) 2 Bott, P. L. 183.

(c) 1 W. Bla. 206.

(b) *Sed vide* 2 Bott, P. L. 184.

(d) *Ante*, vol. i. 16.



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continues in the service without any thing further passing. Then is the relation of master and servant created, and for what time? The understanding which exists in the mind of each might be taken into consideration by the justices at sessions; and if they were satisfied that the hiring for a year was dispensed with only because the other lad was expected, they might take into their consideration what passed at the original treaty; they might infer an agreement to serve upon the terms which the original agreement would amount to, supposing the lad not to be mentioned, or supposing the pauper had been told, generally, that he was to fill the situation of boots and tap boy, and have his board, and lodging, and vails, which would have constituted a yearly hiring. The justices were therefore warranted in inferring that he became a yearly servant. In the case of *The King v. Pendleton (a)*, in which the service was under an unstamped agreement, it was expressly found that no new agreement had been made. This the Court held to be equivalent to nothing having passed. There an express hiring was negatived. So here the justices at sessions were the proper persons to form a judgment as to the footing upon which the pauper remained in the service after it was ascertained that the other boy did not suit the place. They were to draw their conclusion, and were at liberty to find an implied yearly hiring.

LITLEDALE, J.—I think this order must be affirmed. I found my opinion entirely upon the circumstance of there being facts to warrant the finding. I am not prepared to say that I should have come to the same conclusion.

PARKE, J. concurred.

Order of Sessions affirmed.

(a) 15 East, 449.

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## MANLEY v. MAYNE.

THE plaintiff having become bankrupt after declaration and before plea, and the action being continued for the benefit of the assignees, *Talfourd*, for the defendant, obtained a rule for security for costs.

Where a defendant obtains security for costs on the ground that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy.

*Steer*, who was instructed to shew cause, admitted that he could not resist the rule, but submitted that it should be made a term, that the defendant should not plead the bankruptcy of the plaintiff. In a late case (*a*), the Court discharged a rule for security for costs, on the ground that the defendant, after obtaining such rule, had pleaded the bankruptcy of the plaintiff (*b*); and there seems to be no reason why the Court should not interfere *à priori*.

BAYLEY, J. (*c*).—It would be unreasonable that the defendant should obtain security for costs on the ground that the action is prosecuted not by the plaintiff himself, but by his assignees, and then turn the plaintiff round on an objection which is personal to the plaintiff.

*Talfourd*, for the defendant, consenting to this term,

Rule absolute.

(*a*) *Minchin v. Hart*, 1 Chitt. Rep. 215.

(*b*) This would be a plea in bar of the further maintaining of the

action, as in both cases the bankruptcy occurred after the action had been commenced.

(*c*) The only Judge in Court.

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## HIGGINS v. WILLES.

The Court will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced and discontinued, where the action was not pending at the time of the demand.

An award, fixing the rule for calculating the amount of money to be paid, without stating the result of such calculation, is sufficiently certain.

**A RULE** nisi for an attachment for the non-performance of an award having been obtained,

*Armstrong* now shewed cause. This application is resisted on two grounds. 1st. The award is not of such a nature as to make it proper to be enforced by attachment. The question submitted to the arbitrator was, whether *Willes* was liable to pay interest upon certain money transactions between him and *Higgins*? The arbitrator ought to have ascertained the amount, and not to have delegated his authority to others. [*Bayley*, J. If he gives you the rule by which the amount is to be ascertained, the rest is mere matter of addition.] It was not meant that the money should be immediately paid, but merely that the liability should be ascertained. By enforcing the payment by attachment, the party loses his set-off, whereas if *Higgins* is left to his action, no injustice will be done to either party. In *Badley v. Loveday* (a), the Court of C. P. refused to grant an attachment pending an action on the award; nor would they allow the plaintiff to waive the action, to enable him to apply for an attachment on the ground that by bringing the action the plaintiff has made his election. So here the plaintiff, by bringing his action, has waived his right. He has made his election; what is done afterwards is immaterial. In *Badley v. Loveday* it was expressly determined, that a plaintiff could not, by discontinuing the action, restore himself to his election.

*Alderson*, contra, was stopped by the Court.

**BAYLEY, J.**—The affidavits do not shew whether the action was pending at the time the demand was made. But

(a) 1 B. & P. 81.

in order to repel the application, it lay upon the party resisting it to shew that the action was pending when the demand was made. It seems to me, therefore, that we are not precluded, by the decision in *Badley v. Loveday*, from granting the attachment.

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Rule absolute.

The KING v. The Inhabitants of ST. ANN'S,  
BLACKFRIARS.

*SOPHIA GYLES*, wife of *John Gyles*, who was absent from her, and their two lawful children, viz. *John*, aged six years, and *Benjamin*, aged two years, were removed from the parish of St. Ann's, Blackfriars, in the city of London, to the parish of Christchurch in the same city. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case.

Payment of  
watch rate in  
London does  
not confer a  
settlement.

*John Gyles*, the pauper's husband, occupied part of a house in Warwick-lane, in the appellant parish of Christchurch, of the yearly value of 20*l.*, for several months in the year 1821; and during that time he was rated to and paid two quarters' watch rates for the ward of Farringdon-Within, in which ward the said house is situated. The city of London is divided into twenty-six wards, and the wards into precincts. The ward of Farringdon-Within contains seventeen precincts; and the house, in respect of which the watch rates were paid by *John Gyles*, is, with regard to ward matters, in St. Ewin's and not in Christchurch precinct. The watch rate is made by the aldermen and common councilmen of each ward, under the authority of the statute 10 Geo. 2, c. 22, s. 2, which enacts, "for the better raising and levying of moneys for paying the wages of the watchmen and beadles, and other charges incident thereto, that the mayor, aldermen and commons of the said city of London, in common council assembled, every year, shall

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then and there determine and direct what sum and sums of money shall be raised and levied upon each respective ward, for answering the purposes aforesaid; and for raising the said several sums of money, to direct the alderman, deputy, and common councilmen of each and every of the respective wards in the said city of London and liberties thereof to make an equal rate and assessment upon all and every the person or persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards, (regard being had in making the said rates to the abilities of, and likewise to the rent paid by, the several inhabitants and occupiers so to be rated and assessed). And the alderman, deputy, and common councilmen of each ward of the said city, are hereby authorised and required to make such rate and assessment for their respective wards, in such manner and form as shall be so directed by the said court of common council, which rates or assessments shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards by the several constables for the time being of the several precincts, or by the beadles in each of the said respective wards, as the alderman, deputy, and common councilmen of each ward shall direct and appoint; and in case of non-payment, the lord mayor, or the alderman of the ward wherein the premises are situated, may grant a warrant to the collector to levy the same. The form of the watch rates in question (varying the time for which each was respectively made) was as follows :—

“ *London*.—A rate and assessment made upon the several persons who inhabit, hold, occupy, and enjoy any land, house, warehouse, or other tenement within the ward of Farringdon-Within, (the precincts of Blackfriars and Monkwell excepted,) for raising money to pay the watchmen and beadles appointed for the said ward, and other charges incident thereto, (except the watchmen of the aforesaid precincts,) for one quarter of a year, from the 25th of March to the 24th of June, 1821, pursuant to an act of common council of the year 1820.

St. Ewins			
Warwick-lane			
John Gyles	3		

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The question for the opinion of the Court of King's Bench is, whether such rate is one of the public taxes or levies within the statute 3 *Will.* 3, c. 11, or any subsequent act, the being charged with and paying towards which confers a settlement on the party so charged and paying.

*Adolphus* and *Brodrick*, in support of the order. The pauper's husband gained a settlement under 3 *W. & M.* c. 11, which enacts, (s. 6,) "that if any person who shall come to inhabit in any town or parish shall be charged with and pay his share towards *the public taxes or levies of the town or parish*, then he shall be adjudged and deemed to have legal settlement in the same, though no such notice in writing be delivered and published as is hereinbefore required." In *Rex v. Bramley* (a), this Court held that payment of land tax came within the meaning of that act. Lord *Hardwicke* there says, "The great doubt has been whether the legislature did not mean *parochial taxes*; but this has been long gotten over, and the land tax has been holden to be within the act, from the notice of inhabitancy that arises by the party's being assessed and paying it." *Rex v. Mitcham* (b). [*Bayley, J.* The difficulty is, that this is not a parochial tax, nor collected by parish officers.] The

(a) Burr. S. C. 75.

(b) Caldec. 276.

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question is, whether this is not sufficient notice that the party is becoming a parishioner.

BAYLEY, J.—Payment of county rates does not confer a settlement (*a*). This is not a parochial benefit; the object of the rate is the benefit of the ward. The principle of every case is that the parish have notice.

The other Judges concurred.

Order quashed.

*Bolland* and *Payne* were to have argued against the order.

(*a*) Cases of Settlement, 1; 2 Nolan, 107.

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The KING v. The Inhabitants of MATTISHALL.

Where money is advanced by the overseers to an infant about to be apprenticed, for the purpose of providing her with clothes, the indenture is void unless approved of by two justices under 56 Geo. 3, c. 139.

JEREMIAH TAYLOR and Ann his wife were removed, by an order of two magistrates, from *Norwich* to *Mattishall*, in *Norfolk*. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

*Jeremiah Taylor*, on the Sunday morning fortnight before Christmas, 1820, when he was living at *Mattishall* with his father and mother, was informed that *Joseph Middleton*, a blacksmith living at *Wyndham*, wanted a lad. *Taylor* went to *Middleton's* the next day, when they agreed that *Taylor* should go on the Tuesday following, and should stay a month upon liking, and that if they liked each other, he should be apprenticed to him for three years. *Taylor* went to *Middleton's* on the Tuesday following, and continued with him for a month. At the expiration of the month the indenture (a copy of which is annexed) (*b*), was

(*b*) The indenture was for three years, but in other respects was in the common form.

executed; *Taylor* served under that indenture for three years, living during all that time with *Middleton*. *Middleton*, before the indenture was executed, said the pauper should have some better clothes, and the pauper thereupon applied to the parish officers of *Mattishall*. The parish officers, who are the attesting witnesses to the indenture, agreed to give him 2*l.* at the execution of the indenture to buy clothes, and 2*l.* more for the same purpose at the end of the year. They gave the first 2*l.* to the pauper's mistress, who laid it out for him in the purchase of clothes. At the end of the year the other 2*l.* was paid to the pauper.

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The KING  
v.  
MATTISHALL.

*F. Kelly*, in support of the order of sessions. This case depends upon 56 *Geo.* 3, c. 139, s. 11, which, after reciting that the salutary provisions enacted by an act passed in the forty-third year of the reign of her late Majesty Queen Elizabeth, intituled "An Act for the relief of the Poor," are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace, enacts, "that after the 1st day of October, 1816, no indenture of apprenticeship, by reason of which any expense whatever shall, at any time, be incurred by the public parochial funds, shall be valid or effectual, unless approved of by two justices of the peace, under their hands and seals," according to the provisions of the said act and of this act. It is said that the introductory part relates to premium only, and that the enacting part is controlled by the preamble; but if this be an expense incurred by the parochial funds by reason of the indenture, it is within the meaning of the act. It seems impossible to contend that this was not an expense incurred by reason of indenture.

*Chitty*, contra. This was a good apprenticeship. In



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*The King v. Arundel* (a). [Parke, J. Nothing turns upon what the law was before the statute.] The mere intervention of the parish officers, and a donation from them, do not deprive the master or the apprentice of their respective rights, *The King v. Leighton* (b). Overseers frequently advance money to parishioners to prevent their becoming chargeable. The parish officers do not here provide a premium or compel the binding. Nor is it found that any expense was incurred by the parochial funds. The case is not within the words or the spirit of the act.

BAYLEY, J.—The order of sessions is right. The enacting part of this statute clearly goes beyond the recital; if it did not I could not say that this money was paid as a premium. It was in fact paid to enable the apprentice to make a better appearance. The boy applies not to the father or mother, but to the overseers; upon which they supply him with 2*l.*, and promise 2*l.* more at the end of the year. The case does not state that they paid the money out of the parochial funds; but they were applied to as overseers, and the presumption therefore is, that the payment was made out of parish funds; if it were not so, that fact might have been easily set right at sessions. The Court of Quarter Sessions could not have arrived at the conclusion to which they came, if they had not inferred that the payment by the overseers was made not out of private but out of parochial funds. If that be so, then look to the words of the act. “By reason of which any expense whatever shall, at any time, be incurred by the public parochial funds.” The money in question was paid because the master objected to taking the apprentice unless an expense was incurred by the parish. It seems, therefore, to fall within the act.

LITLEDALE, J.—I am of the same opinion. It is said,

(a) 5 M. & S. 257.

(b) 4 T. R. 732.

that some gentlemen advance money to parishioners out of their own money, to prevent their becoming a burthen on the parish; if that had been so here, the case would have stated that *A. B.* and *C. D.*, being parish officers, advanced the money out of their own pockets.

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PARKE, J.—It must be taken to be money advanced by them as overseers on this finding, not out of their own pockets.

Order confirmed.

MORGAN, Esq. v. Sir LUCIUS CURTIS, Bart.

CASE. The declaration stated that the plaintiff was possessed of a certain messuage, with the appurtenances, in the parish of Catherington, in the county of Southampton, and inhabited and dwelt with his family therein; and by reason thereof ought to have for himself and his family, inhabiting the said messuage, the use and benefit of a certain pew *in the chancel* of the parish church of Catherington, to hear and attend divine service therein, as to the said messuage belonging and appertaining; and that defendant wrongfully entered and caused and procured other persons to enter said pew, during the celebration of divine service, whereby plaintiff could not have or enjoy, &c.: Plea, not guilty. At the trial before *Park, J.* at the last assizes for the county of Hants (*a*), the following facts appeared. The pew in question was built in the year 1773 by the late Lord *Hood*, who had then lately purchased of one *Collins* a cottage in Catherington. Previously to the erection of this pew, the site was occupied by two old open seats and a box, in which was kept the Communion plate, and an old stool outside of the seats. It was proved that *Collins* had sat in these old seats; but the same witness stated that many strangers sat there also, and that the vicar and the lay rector,

A right to a pew can only exist by faculty or by prescription. Where the prescription is interrupted the jury are not bound to presume a faculty from long undisturbed possession.

(a) Counsel for the plaintiff, *Selwyn, Pollen, Merewether*, Serj., and *Dampier*; for the defendant, *Selwyn, Pollen*, and *Manning*.

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and one *Tooker*, had closed seats in the chancel. It appeared that in 1809 the steps leading from the aisle to the altar, and also the top of the communion table, had been repaired at the expense of the parish. The present Lord Hood, who was examined as a witness, stated that he sold Catherington House to the plaintiff in 1803, but that he never sold the pew with the property, and that no notice was taken of the pew at the time of the sale. The conveyance from Lord Hood to the plaintiff was not produced. The defendant (who was admitted to be the lay rector) called no witnesses, but contended that no right to this pew, either by prescription or faculty, had been made out; and the cases of *Stocks v. Booth* (a) and *Griffiths v. Matthews* (b), were cited. The learned Judge told the jury that there was no doubt as to the law of the case, which had been laid down distinctly by Mr. Justice Buller in *Stocks v. Booth*; that he was of opinion that the evidence of the former seats' being open destroyed the prescription; that it was for the jury to say upon the evidence whether any faculty existed; but that if any faculty had been granted, it might have been ascertained by application to the office; and that it would require strong evidence to induce a belief that the bishop would grant a faculty to erect a seat in a chancel belonging to a lay or a clerical rector. The jury found a verdict for the defendant.

In Michaelmas term, *Merewether*, Serjt., obtained a rule nisi for a new trial, on the ground of misdirection and that the verdict was against the weight of evidence; and he cited *Rogers v. Brookes* (c).

*Munning* (with whom were *Selwyn* and *Pollen*) now shewed cause. This case falls within the rule laid down in *Griffiths v. Matthews*. That was a claim for a pew in the chancel, and the Court held that by shewing the origin of an enjoyment for thirty years, the prescrip-

(a) 1 T. R. 428.

(c) 1 T. R. 431, n.

(b) 5 T. R. 296.

tive claim was destroyed. *Rogers v. Brookes* is very distinguishable. There the action was brought against a mere wrong-doer, and not as here against the lay rector. In that case also the Court merely decided that there being some evidence to go to the jury, and the jury having found a verdict for the plaintiff, they would not disturb that verdict. So here, if the jury had found a verdict for the plaintiff, the Court perhaps would not have interposed to assist the defendant. But the case having been properly left to the jury, and the jury having come to a conclusion which was warranted by the evidence, there is no ground for disturbing the verdict. Supposing that the jury had power to presume a faculty, they were not bound to do so; and although the leaning of Courts was formerly in favour of presumptions, the course now is for Judges to direct juries not to presume an instrument unless under all the circumstances of the case they actually believe that the particular document once existed; *Livett v. Wilson* (a). Here if any faculty had been granted, the grant must have been made since 1773; and proof of its existence might have been obtained by applying at the proper office of the diocese of Winchester, which the jury knew to be within a few minutes' walk of the place where the Court was sitting.

*Merewether*, Serjt., and *Dampier*, in support of the rule. In *Livett v. Wilson* the right of way had been constantly disputed. Here the usage has been altogether interrupted during what may be called the incumbency of three lay impropriators. This is precisely within the case of *Rogers v. Brookes*, where the Court said that after so long a possession they would presume anything in favour of the rights. [*Bayley*, J. There the pew was kept locked thirty-six years.] Here Lord Hood would have been a trespasser in erecting the pew if he had no right. [*Bayley*, J. You would be under another difficulty; if the new pew was built

(a) 3 Bingham, 115; 10 J. B. Moore, 439. And see *Lopez v. Andrew*, ante, 329, n.

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larger than the old seats, the presumption would not be available for the whole of the pew. The difference between an open and a closed pew is so strong, that the probability is that as soon as the party had ascertained his rights he would inclose.] Supposing the right to the chancel to have been in the lay rector, there was sufficient here to authorise the jury to presume a grant from him. And though in *Clifford v. Wicks* (a) it was held that the grant by a lay impropriator of part of the chancel to a man and his heirs and assigns was not valid, that decision proceeded from the principle that such an interest could not be limited to a man *and his heirs*. There is a case in Noy, 133 (b), which shews that a man may have a seat in a chancel by prescription, and the jury may presume a grant by the lay rector with the assent of the ordinary. [Bayley, J. There must be a faculty to enable you to exclude the parishioners.] *Clifford v. Wicks* was followed up by *Mainwaring v. Giles* (c). *Griffiths v. Matthews* is clearly distinguishable. There the new seat was not connected with the pre-existing right. The circumstance of the old seat's being open does not destroy the prescriptive right. It was rather a question of comfort, and the occupiers of the old house might be satisfied with an open seat. The preponderance of reason, if not of authority, is in favour of the jurisdiction of the ordinary in the chancel; and the churchwardens, by whom he acts, might put parishioners in the pews in the chancel, if they were not used by the persons to whom they belonged. The distinction is between private chancels, which would not have existed had they not been built by the persons to whose use they are appropriated, and public chancels in which the altar is placed for the use of the parish at large. [Littledale, J. The ordinary has the full use of the public chancel for the purposes of religion, as to order the service to be read there.] There was no evidence that any other person sat in Lord Hood's seat when the family was

(a) 1 B. & A. 498.

(c) 5 B. & A. 356.

(b) *Hall v. Ellis*.

there. [*Bayley, J.* The fact of enlarging the pew, though it would not of itself destroy the prescriptive right, might operate upon the jury as to the existence of such prescriptive right; since, if it existed, the party would have put it in hazard by the enlargement]. The lining of the seats was a species of repairs. [*Bayley, J.* Lining has been held not to be repairing; it is what has been called by the plaintiff's counsel a question of comfort. There is no evidence of reputation as to the right from persons now dead. *Little-dale, J.* It is not very likely that the occupier of a cottage would have two seats. *Bayley, J.* In *Rogers v. Brookes* the lock was considered a very strong circumstance to shew that the new pew was built under the old right]. It was said that it did not appear whether Lord Hood had paid anything to the rector for burying in the chancel. But that was requiring of the plaintiff to prove a negative. [*Bayley, J.* The right of sepulture is quite distinct from the right to a pew. Besides which it acts both ways; for supposing it to be material, no evidence was given of the exercise of any right of burial in respect of this property before the time of Lord Hood. It would therefore seem to be a concession confined to this family].

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BAYLEY, J.—I see no ground for objecting to the manner in which this case was left for the consideration of the jury. The plaintiff was bound to make out a title by prescription or by a grant by faculty. It is not sufficient to say that under somewhat similar circumstances another jury came to a different conclusion. We are to see whether there was evidence to warrant the conclusion to which this jury has come. Where you have an inhabitant in a parish, the probability will be that he will have some permanent place for him and his family to sit in. A person occupying a respectable station is not each time he comes to church to wait till the clerk or sexton allots a sitting to him. So if a person has a house of considerable size in the parish. But this would arise from concession or actual allotment.

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The right is virtually in the ordinary, and that right is exercised by means of the churchwardens, and they place the parishioners in the different pews. In many churches this power is never exercised by the churchwardens, and particular houses and particular families are allowed to have permanent pews. The pews would generally go with the house; but mere occupation alone is not sufficient to force the jury to find a right. Lapse of time was a circumstance which the jury might consider, and which might be fairly pressed upon them. But the plaintiff here has all his title deeds; and if upon searching the old title deeds any mention of this right had been found, the jury might have formed their conclusion accordingly. It is no uncommon thing to introduce the specification of a pew into title deeds, and this is done with two objects; to have a sort of warranty of the right from the vendor, and to possess documentary evidence of the right. If that had been required in the present instance Lord Hood might perhaps have said, I will not put in it into the conveyance, because it is not mentioned by the older deeds. The distinction between *Rogers v. Brookes* and the present case is this, that there the plaintiff was put into possession by the clergyman and parish officers when the church was rebuilt, and he locked the pew up; and the Court do not say that 40 years were sufficient, but they rely upon the locking up as evidence of a pre-existing right. The jury then came to that conclusion, and perhaps if the jury had come to the same conclusion in this case, we might not have interfered with their finding, but if this was purely for the jury and there is nothing to find fault with in the direction given by the learned judge we cannot send the case to a new trial. Perhaps if I had been on the jury, I should have come to the same conclusion, but that it is not necessary to consider. The jury were asked whether there was a prescriptive right, or whether from the exclusive possession they would presume a faculty. I should not have presumed a faculty. There was no search to see whether a faculty could be traced, or whether there was any defect in the records. So

if there had been a grant from the lay rector, the presumption is, that the grant would have been forthcoming. In the absence of such evidence, I should not have presumed a faculty or a grant.

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LITTLEDALE, J.—I see no objection to the learned judge's direction. The question of prescription was left to the jury. Lord Hood had the possession and perhaps the exclusive possession, and if the case had rested there, and no evidence had been given as to the origin of that possession, a jury would in ordinary cases presume a prescriptive right. But we are let into the origin of this possession, and we have no statement that Collins sat there, except from a person who states that other persons sat there also. In the absence of evidence we must look to probabilities. The case is much too vague to say that the jury were bound to come to a different conclusion. I do not say that the jury might not have come to a different conclusion. If any faculty had existed, it might have been easily found in the Bishop's Register.

PARKE, J.—I think we ought not to send this case to a new trial. With respect to misdirection the case was left to the jury in much the same terms as were used by Mr. Justice Buller in *Griffiths v. Matthews*(a) and in *Stocks v. Booth*(b). It is not a ground for sending the case to a new jury that every point has not been left as favorably as the parties may have wished.

Rule discharged.

(a) 5 T. R. 296.

(b) 1 T. R. 428.





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MORLEY and others v. HAY (a).

Upon a sale of goods the transitus continues until the goods have reached their ultimate destination under the contract of sale, or the vendee has given a new direction to the property.

The right of a vendor to stop in transitu is paramount to any lien against the purchaser.

**TROVER** for a log of mahogany. At the trial before *Alexander, C. B.*, at the last Spring Assizes for the county of Derby (*b*), it appeared that the plaintiffs, who carry on the business of timber merchants at Hull and Doncaster, sold the log in question to *Gamble*, a joiner, residing at Shotle-Gate, in the county of Derby, at two miles from Chase Wharf, where the defendant carries on the business of a wharfinger. The mahogany was sent by water carriage from Doncaster to Gainsborough, and thence forwarded by a boat to the defendant's wharf. The freight from Doncaster to Gainsborough, as well as the charges from Gainsborough to the defendant's wharf, amounting together to 17s., were paid by the defendant. A short time after the mahogany was ordered, and before it arrived at the defendant's wharf, *Gamble* called upon Mr. *Flewknur*, the plaintiffs' attorney, who had happened to be present when *Gamble* gave the order for the mahogany, stated that he was in insolvent circumstances, and requested that the plaintiffs would release him from his bargain. *Flewknur* being aware that *Gamble* was considerably indebted to the plaintiffs, assented to the rescinding of the bargain (*c*). *Gamble* also wrote the following letter to the plaintiffs:—

(a) This action was originally brought in the Court of the Honour of Peveril, from which it was removed by the defendant.

(b) Counsel for the plaintiffs, *Denman, C. S.*, and *Balguy*; for the defendant, *Clarke* and *Clinton*.

(c) The property in goods bought of *A.* by *B.*, as agent for *C.*, and delivered by *B.* to *C.*'s packer, in whose hands they are attached for the debt of *C.* revests in *A.*, by *C.*'s having countermanded the purchase by letter to *B.*, sent before such delivery, though not received by *B.* till afterwards, *A.* assenting to take back the goods;

and the attachment is thereby avoided. *Salte v. Field*, 5 T. R. 211.

*A.*, living at North Tawton in Devonshire, ordered goods of *B.* in London, who sent them to ship *via* Exeter, consigned to *A.* and advised him thereof. On their arrival at Exeter the goods were delivered to *C.*, a wharfinger, who received them on *A.*'s account, and paid the freight and charges. After their arrival *A.* wrote to *B.*, informing him, that in consequence of his affairs being deranged, he should not take the goods, and telling him that they were at Ex-

"Gentlemen,

"I received your letter a few days ago respecting the mahogany log. I am sorry that you sent it. If you can stop its progress, and sell it to another customer, I should prefer; if it comes forward I will speak to Mr. Hay about it. The first payment is nearly due, and I see no chance of raising the money."

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Hearing that the mahogany was at the defendant's wharf, *Isaac Morley*, one of the plaintiffs, went there, saw the defendant, and demanded the log. This the defendant said he would give up on the payment of the charges upon it, which he said amounted to 17s. The defendant being unable to give change, *I. Morley* said that he had no silver, and promised to send the 17s.; and the defendant engaged to deliver the log to the order of the plaintiffs, and in the meantime to nail their card upon it. *I. Morley* then gave the defendant a card for the purpose, and the card was fixed upon the log by the defendant himself (a). Afterwards,

eter; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. *B.* applied to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of *A.*, though indemnified by *B.* It was held that *B.* had a right to stop the goods in the hands of *C.*, and might maintain trover for them against *C.* *Mills v. Ball*, 2 B. & P. 457.

In *Bartram v. Farebrother*, 4 Bingh. 579, *A.*, to whom goods were consigned, said, on their arrival at the wharf of *B.*, a wharfinger, that he would not have them, and directed *C.*, an attorney, to do

what was necessary to stop them. *C.*, on the 3d, gave *B.* an order not to deliver them to *A.*, which order, *D.*, the consignor, confirmed on the 6th. On the 7th the goods were claimed under an execution, at the suit of *E.* The Court of Common Pleas held, that the contract between *A.* and *D.* was rescinded, that the transitus was not ended by the arrival of the goods at the wharf and the order given by *A.*, and that *D.* had a right to stop in transitu.

(a) As to the effect of marking goods as a symbolical delivery, see *Ellis v. Hunt*, 3 T. R. 464; *Stoveld v. Hughes*, 14 East, 316; *Hodgson v. Le Brett*, 1 Campb. 234; *Harman v. Anderson*, 2 Campb. 234.

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however, the defendant changed his mind, and sent the following letter to the plaintiffs:—

“ Chase Wharf, near Belper, June 6, 1827.

“ Gentlemen,

“ You are hereby informed, that *Charles Gamble* is 12*l.* 7*s.* 5*d.* in arrear to us, for carriage of goods (a), and the log which Mr. *Morley* saw will be distrained (detained) till the money is paid.”

The plaintiffs then tendered the 17*s.* and demanded the mahogany, which the defendant refused to deliver. The learned Judge told the jury that a wharfinger had a general lien; and that if the payment of freight upon goods delivered at his wharf formed a necessary part of his business, such payments would be protected by the lien; but that it was competent to him to waive his lien, and that it was for the jury to consider, whether it was not fair to infer from the evidence, that the defendant had intended to waive his lien in this case, but that the plaintiffs could not avail themselves of the circumstance of the contract being rescinded, as the lien had then attached. The jury found a verdict for the plaintiffs, for the value of the mahogany.

In *Easter Term* *Clarke* obtained a rule, calling upon the plaintiffs to shew cause why a new trial should not be had, upon the ground of misdirection.

*Denman* and *Lungslow* appeared to shew cause, but the Court called upon

*Clarke* and *Clinton* to support the rule. The conversation between *Gamble* and *Flewknor*, and *Gamble's* letter, ought not to have been received in evidence. *Gamble* himself should have been called. [*Bayley, J.* The rule was not moved for on the ground of the reception of im-

(a) *i. e.* for money advanced for the carriage of goods brought to the defendant's wharf.

proper evidence. But these are acts done by *Gamble* in the course of this transaction, and not merely declarations made by him (a).] A wharfinger has a general lien. [*Bayley*, J. Not upon goods which are going forward to another place. *Parke*, J. Not against a party who has a right to stop in transitu.] The transitus was at an end *quoad* the wharfinger. Suppose the log had been burnt whilst lying on the wharf, by whom must the loss have been borne? [*Bayley*, J. Certainly by *Gamble*.] Suppose *Gamble* had sold the mahogany. [*Bayley*, J. Then he would have given a new direction to the goods, and the transitus would have been at an end. From *Rowe v. Pickford* (b), and other cases on the subject, I have drawn this conclusion, that the direction upon the goods is to determine whether the transitus is ended or not. In *Rowe v. Pickford* the goods were directed to London; here the direction on the mahogany was Shottle-Gate, which was some miles distant from the defendant's wharf; therefore until the mahogany arrived at Shottle-Gate, or until *Gamble* gave it a new direction, it was in transitu. In *Rowe v. Pickford* there was no direction on those goods beyond London. If a trader is in the habit of leaving his goods at a wharf until the wharfinger receives directions from him where to forward them, the transitus would be at an end as soon as the goods arrived at the wharf, except where an ulterior direction is sent with the goods by the consignor. *Parke*, J. The vendor has power to stop in transitu without satisfying a general lien. *Oppenheim v. Russell* (c). *Bayley*, J. A wharfinger can derive a title to a general lien only by contract (d), but here the plaintiffs claim paramount *Gamble*,

(a) As to the distinction between statements which are to be considered part of the *res gesta*, and therefore admissible in evidence, upon the testimony of a person who heard them, and statements which, forming no part of the transaction itself, are merely representations of the party from

whom they moved, requiring to be confirmed by his oath, see *Starkie*, Evid. part i. 47, &c.

(b) 1 B. Moore, 526, 8 Taunt. 83.

(c) 3 B. & P. 43.

(d) See *Rex v. Humphrey*, 1 M'Clelland, 175; *Holderness v. Collinson*, ante, vol. i. 55, 7 B. & C. 215.


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the party with whom such contract must have been made. *Parke, J.* In *Oppenheim v. Russell*, Mr. Justice *Heath* says, "If this is a power reserved out of the ancient dominion the consignor has over his property, it is paramount to any sort of agreement as between the carrier and consignee.] There must be some time when the transitus is to be considered at an end. Here the plaintiffs by suffering the goods to remain for four or five weeks in the hands of the wharfinger may have induced him to desist from demanding payment of his bill. Then if the transitus was at an end, the defendant would be entitled to hold the goods by reason of his general lien. [*Parke, J.* If the transitus was at an end, the plaintiffs would have no title, independently of the question of lien.] In *Richardson v. Goss (a)*, Mr. Justice *Chambers* said distinctly "I should strongly incline to think that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse." Here *Gamble* was in the habit of using the wharf as his warehouse. [*Parke, J.* There is no evidence to that effect. *Littledale, J.* When the rule was moved for, it was stated that *Gamble's* goods were usually left at the wharf until they were sold or carried away by *Gamble*. *Bayley, J.* If that were so, you would have this difficulty, that the defendant says he is willing to receive the 17s. and puts the names of the plaintiffs on the log.] *Oppenheim v. Russell* is quite beside this case. No tender was made at the time when the defendant expressed his readiness to give up the log upon being paid the 17s., and the plaintiffs were therefore not in a condition to take away the goods, and consequently the lien continued. [*Bayley, J.* The conversation between the defendant and *Isaac Morley* would prevent the plaintiffs taking steps against *Gamble*.] They could have taken none, for the property of *Gamble* was at that time seized under an execution issued by the plaintiffs themselves.

(a) 3 B. & P. 119.

[*Parke, J.* Then they would have sold for 16*l.* more.] If the lien could be considered as waived, the plaintiffs have mistaken their remedy. Instead of trover, they should have brought an action of special assumpsit. The only case where a lien has been considered as waived, is that of *Boardman v. Sill* (a); but there the defendant claimed the property absolutely. In *Richardson v. Goss*, the contract had been rescinded before the arrival of the goods at the wharf, and the whole case turned upon the circumstance of the rescinding of the bargain being prior to the arrival. It may therefore be assumed, that if the goods had reached the wharf before the contract had been abandoned, the Court would have held that the rescinding came too late. Here the evidence is that the contract was not abandoned until after the arrival of the mahogany at the defendant's wharf (b).

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BAYLEY, J.—I am of opinion against the defendant on both points. In *Rowe v. Pickford* the vendor had no warehouse of his own in town. The goods were to remain there until an opportunity for shipping them occurred. They had arrived at their only place of deposit. In *Richardson v. Goss* it does not appear what was the ultimate destination of the bacon and hams. Here the goods were specifically directed to Mr. *Gamble*, Shottle-Gate. Until the mahogany reached Shottle-Gate, or *Gamble* gave an order not to send it to Shottle-Gate, it would be on its way to that place, and the transitus would continue. But suppose that the transitus had ceased, the plaintiff went to the wharf and saw the goods. The defendant must then have known whether he meant to insist upon his lien or not. At all events he ought not so to act as to hold out anything to lull the plaintiffs, without afterwards fulfilling the expectations which he had raised. He cannot afterwards turn round and insist upon a further claim.

(a) 1 Campb. 410.

(b) And see *Tucker v. Gilbert*, 4 Bingh. 517.

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LITLEDALE, J.—If *Gamble* had made the wharf his warehouse, the case would have been altered. Here it does not appear that he did make the wharf his warehouse. The goods were directed to Shottle-Gate. The 17s. was all that the defendant could claim.

PARKE, J.—There was evidence to go to the jury that the defendant had waived any lien; and it is sufficient to say that that evidence was left to the jury.

Rule discharged.

The KING v. PHILIP WILLIAMS, Esquire.

Where a *mandamus* to admit a churchwarden recites that the party was duly nominated, elected and chosen, "not duly elected" is a good return.

IN Trinity term a writ of *mandamus* issued to *Philip Williams*, esq. official and commissary of and within the parish of Hornchurch and liberty of Havering-atte-Bower, in the county of Essex, or other competent officer in that behalf, in the following terms:—"Whereas *James Meakins*, an inhabitant and parishioner of Hornchurch aforesaid, in the said county of Essex, was heretofore, to wit, on the 15th day of May last past, duly nominated, elected and chosen into the place and office of churchwarden of the said parish of Hornchurch, to serve in the said place and office for the year ensuing, according to the custom of the said parish, and ought by you to have been sworn and admitted into the same place and office: And whereas the said *James Meakins*, after such his nomination, election and choice, as aforesaid, did in due manner present and offer himself before you to be sworn and admitted into the said place and office of churchwarden of the said parish of Hornchurch: Yet you, well knowing the premises, but not regarding your duty in this behalf, have absolutely refused and neglected, and yet do refuse and neglect, to swear and admit him, the said *James Meakins*, into the said place and office of churchwarden of the said parish of Hornchurch,

without any reasonable cause whatsoever: In contempt of us, to the great damage and grievance of the inhabitants of the said parish, more particularly of the said *James Meakins*: As we have been informed from his complaint made to us in this behalf: We therefore, being willing that due and speedy justice should be done to the said *James Meakins* in this behalf, as it is reasonable, do command you, firmly enjoining you, that, immediately after the receipt of this our writ, you do without delay admit and swear the said *James Meakins* into the place and office of churchwarden of the parish of Hornchurch, in the said county of Essex, together with all the liberties, privileges and franchises, emoluments and advantages, to the said place and office belonging and appertaining: Or that you shew us cause to the contrary thereof: Lest in your default the same complaint should be repeated to us: And how you shall have executed this our writ make known to us at Westminster on Thursday next after the Morrow of All Souls, then returning to us this our said writ: And this you are not to omit, on peril that you may fall thereon. Witness *Charles Lord Tenterden* at Westminster, the 16th day of June, in the 9th year of our reign.

By the Court,

By rule of Court.

*Lushington.*"

To this writ the following return was made:

"I *Philip Williams*, esq. official and commissary of and within the parish of Hornchurch and liberty of Havering-atte-Bower, in the county of Essex, do humbly certify and return to our Lord the King, at the day and place within contained, that the within-named *James Meakins* was not duly elected into the office of churchwarden of the within-named parish of Hornchurch, to serve in the said place and office for the year ensuing, according to the custom of the said parish, as by the within writ is suggested; therefore I cannot admit and swear the said *James Meakins* into the said place and office of churchwarden of the said parish of Hornchurch, together with all the liberties, privileges, franchises, emoluments and advantages to the said place

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and 'office belonging and appertaining, as by the within writ I am commanded. *Philip Williams.*"

In Michaelmas term *Brodrick* moved to quash this return as insufficient, and cited *The King v. Martin Rice* (a), where it was held that the archdeacon had no power to refuse to swear and admit a churchwarden, that he had no authority to examine, his office being entirely ministerial. He referred also to *The King v. White* (b), and *The King v. Harris* (c). The Court thought the matter could not be properly disposed of by motion, and directed that it should be set down for argument. The case being now called on in the Crown paper,

*Brodrick* referred to Burn's Eccl. Law, 155, where the cases are collected, some of which, it must be admitted, are contradictory. In *Rex v. White*, to a *mandamus* directed to the archdeacon to swear in a churchwarden, he returned "*non fuit electus*;" upon opening which Mr. Justice *Fortescue* said, "that it was settled and had been often ruled, that the archdeacon could not judge of the election, and therefore the return was ill." Whereupon a peremptory *mandamus* was granted. It is true that the reporter goes on to say, "but note, it was certainly wrong, for the return was a good return, and has often been made to such *mandamus*, and actions brought upon the return and tried." [*Littledale*, J. If this return could not be made, the *mandamus* ought to have been peremptory. *Parke*, J. The return to the *mandamus* traverses the supposal in the writ. You must argue that the writ would have been good if it had omitted the allegation of an election.] The officer cannot return that the party is not elected. [*Bayley*, J. If the suggestion in the writ had been that the party was not elected, the officer could not return that he was not duly elected. *Parke*, J. If the fact suggested fails, the

(a) 1 *Ld. Raym.* 138.

*Rex v. Simpson*, 2 *Stra.* 894, and

(b) 2 *Ld. Raym.* 1379, cited

*Selw. N. P.* 1069, 7th ed.

and approved upon this point in

(c) 3 *Burr.* 1420.

foundation of the writ fails.] By this return the officer pronounces a judgment upon the election, which he is not authorised to do. In *Rex v. White* the return was, "not elected." In *Rex v. Harwood* (a) the same return was made; but from the report of the case in 8 Mod. (b), it would appear that the Court awarded a peremptory *mandamus*, on the ground that it was not competent to the archdeacon to enter into evidence for the purpose of ascertaining the truth of the allegation. [Bayley, J. The case is differently reported by Lord Raymond, who says (c), "But both my brother Reynolds and myself took the return to be good. But upon the importunity of the counsel for Folbigg, and pressing the authority of the case of *The King v. White*, and no counsel for the defendant appearing, a rule was made for a peremptory *mandamus, nisi*, &c. At which afterwards my brother Reynolds and I were much dissatisfied; but the counsel for the defendant at another day coming to show cause against the rule, we discharged the rule. And the Court not being unanimous, it was ordered to come on again in the paper. But I never heard it stirred again. But there can be no doubt but such a return is good." That is certainly the effect of the case, as reported by Lord Raymond; but in *Rex v. Ward* the case is cited from 8 Modern. [Bayley, J. Lord Raymond, who decided *Rex v. Harwood*, is more likely to be correct than the editor of 8 Modern—a book notoriously inaccurate and of no authority. Littledale, J. He is to make such inquiries as to satisfy himself that the person applying is not a mere stranger. Parke, J. He exercises no judgment, but merely denies your allegation.] In *Rex v. Harris*, Lord Mansfield says, that the commissary has no right to try the question as to which party was duly elected. He cannot try the legality of the votes; and it being urged that *non fuit electus* was a good return, and that there being two cross *mandamuses*, the defendant did not know which to obey, Lord Mansfield

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(a) 2 Ld. Raym. 1405.

(c) 2 Ld. Raym. 1405.

(b) 8 Mod. 380.

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and Mr. Justice *Wilmot*, the only Judges in Court, said, that he ought to obey both, and that it was without prejudice to the right of either claimant. [*Bayley, J.* Though the commissary cannot decide upon the election, and thereby bind the parties, he may at his peril return that the prosecutor of the *mandamus* was not duly elected, and give the opportunity of raising the question, in an action for a false return.] The prosecutor has no interest in questioning this return; for if it is pronounced sufficient, he will immediately bring his action for a false return. His apprehension is, that after bringing an action he may be turned round, by being told that the return is bad in law. [*Parke, J.* The commissary takes it upon himself to say that the party is not duly elected. This he states, not judicially, but merely as a denial of a fact suggested. If he could not do this, he would be bound to swear any one who tendered himself. *Littledale, J.* The return is, "I am bid to do a thing which there is no foundation for."]

The Court, without calling upon *Erle*, by whom it was to have been supported,

Allowed the Return.

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HESSE v. ALBERT.

By a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher, the husband covenants generally to pay her 250*l.* *per annum* during her life:—The covenant is controlled by the recital, and dismissal from the office justifies non-payment of the annuity.

**COVENANT.** The declaration stated, that on the 15th of October, 1823, at, &c., by a certain indenture between defendant of the one part, and *Sarah*, then and still being the wife of the said defendant, and the said plaintiff, of the other part (profert), after reciting that some unhappy

differences had arisen between the defendant and *Sarah* his wife, and that they had mutually agreed to live separate and apart from each other, and that previously to such separation the defendant had consented thereto, and had also proposed and agreed, that out of the salary which he then enjoyed as a searcher in his Majesty's customs, he would allow and pay the said *Sarah* his wife, during the time he so held his said situation, for the better support and maintenance of her the said *Sarah* and their children, *Isabella*, *Emma Maria*, and *Adelaide*, during the time his children should live with the said *Sarah* his wife, and remain unmarried, 250*l.*, clear of all taxes, charges, and deductions, payable to her in such manner as thereafter mentioned, subject to the proviso thereafter contained respecting payment of the said annuity, the defendant, in pursuance of his said proposal and agreement, did thereby for himself, his executors and administrators, covenant with the said plaintiff, his executors, administrators, and assigns, that it should be lawful for the said *Sarah*, and that he the said defendant would permit and suffer her the said *Sarah*, from time to time and at all times from thenceforth, during her natural life, to live separate and apart from him, and to reside and be in such place and places, family and families, and with such relations, friends, and other persons, and to follow and carry on such trade and business as the said *Sarah* from time to time, at her will and pleasure, notwithstanding her then coverture, as if she were a *feme sole* and unmarried, should think fit; and that the said defendant should not nor would, at any time or times thereafter, sue her the said *Sarah* in the Ecclesiastical Court, or any Court, for living separate and apart from him, or compel her to cohabit with him, or to sue, molest, disturb, or trouble her for such living separate and apart from him, or any other person or persons whatsoever, for receiving, harbouring, or entertaining her; nor should nor would, without the consent of her the said *Sarah*, visit her, or knowingly come into any house or place where she

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might dwell, reside, or be, or send or cause to be sent any letter or message to her; nor should nor would at any time thereafter claim or demand any of the moneys, rings, jewels, plate, clothes, linen, woollen, household goods, or stock in trade, which she the said *Sarah* then had in her custody or possession, or which she should or might thereafter buy or purchase, or which should be devised or given to her, or she should otherwise acquire; and that she should and might enjoy and absolutely dispose of the same as if she were a *feme sole* and unmarried: and that he the said defendant, his executors or administrators, or some or one of them, should and would well and truly pay unto the said *Sarah* or her assigns, during the term of her natural life, for and towards her better support and maintenance and education of the said children, one annuity or clear yearly sum of 250*l.*, free and clear of all taxes, charges, and deductions whatsoever; the said annuity or yearly sum of 250*l.* to be paid and payable to the said *Sarah* and her assigns during her natural life, at or upon the 15th day of January, the 15th day of April, the 15th day of July, and the 15th day of October, or within ten days next after, in every year, by four equal proportions, the first quarterly payment thereof to be begun and be made on the day of the date of the said indenture, or within ten days then next following. In consideration of which 250*l. per annum* so thereby made payable to the said *Sarah* as aforesaid, she the said *Sarah* had agreed to accept and take, in full satisfaction for her support and maintenance, and all alimony whatsoever, during her coverture, and also for the maintenance, support, and education of her said children. Proviso for deducting any debts which defendant might be compelled to pay. Proviso also, that in case any or either of the said children should die or be married during the lifetime of the said *Sarah*, then and in every such case so much of the said annuity or yearly sum of 250*l.*, payable as aforesaid, to wit, the sum of 25*l.*, should be abated and deducted out of the said 250*l.*, as being the particular

share of such child so dying or marrying as aforesaid. Proviso, that the deduction in all or any of the events of the said children so marrying or dying should not be greater than 100*l. per annum*, it being the agreement and intention of the said parties, that in any case the said *Sarah* should not receive a less allowance or annuity than 150*l. per annum*. And defendant for himself, his heirs, &c., for the true and faithful performance on his part, of all and every the covenants, &c., did thereby bind himself in the penal sum of 1000*l.* to be recovered in &c., as ascertained and liquidated damages, and not as a nominal penalty (*a*). Averment, that from the time of making the indenture, defendant and *Sarah* his wife have lived and still do live separate and apart from each other, and that after the making of the said indenture, and before the sum of 56*l. 5s.* hereinafter mentioned, became due, to wit, on &c. at &c., one of the children, to wit, the said *Emma Maria* married a certain person, to wit, one Mr. *Peppercorn*, and that neither of the other children have at any time intermarried with any person; and that from the time of the making of the said indenture, and until the said *Emma Maria* married as aforesaid, all the children lived with the said *Sarah*, and continually since the marriage of the said *Emma Maria* the other children have lived with the said *Sarah*, to wit, at &c. Nevertheless the said plaintiff in fact saith, that after the making of the said indenture, to wit, 18th January, 1828, at &c., a large sum of money, to wit, 56*l. 5s.* of the annuity or yearly sum of 250*l.* for one quarter of a year ending on &c., after making and allowing such deduction on account of the said *Emma Maria* as aforesaid, became and was due from defendant, and still is in arrear and unpaid, and hath not been paid or satisfied by defendant to the said *Sarah*, or otherwise howsoever, although ten days from the day and year last aforesaid have elapsed; nor hath defendant paid or satisfied the said sum of 1000*l.* or any part thereof; and

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(*a*) As to the effect of this clause see *Barton v. Glover*, Holt, N. P. C. 43; *Baker v. Webb*, Mann. N. P. Digest, 2d edit. 230; *Astley v Weldon*, 2 B. & P. 346.

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the same is still due and unpaid and unsatisfied, contrary &c. Plea, first, *Non est factum*. Secondly, that after the making of the said indenture and before the said 15th day of January, 1828, in the said breach of covenant mentioned, and before the said sum of 56*l.* 5*s.* in the said breach of covenant also mentioned, or any part thereof, became payable, as in the said declaration is supposed, to wit, on the 19th day of November, 1827, to wit, at &c. the said defendant ceased to hold and was deprived of the situation of a searcher in his Majesty's customs and of the salary belonging to such office, and continually from the day and year last aforesaid until and at &c. after the commencement of this suit, he the said defendant hath wholly ceased to hold or enjoy such situation or the salary thereunto attached, to wit, at &c., and this &c. Third plea as the second, but omitting the words in italics. General demurrer to the second and third pleas; and joinder.

*Curwood*, for the plaintiff. The covenant is absolute, and nothing in the previous recital can controul it. It cannot be said that the wife was to starve if the defendant should lose his situation.

BAYLEY, J.—We are bound to look at the whole of the instrument together. The defendant covenants to pay this annuity generally; the agreement was for making it payable out of the salary; which has ceased, not from any act on the part of the defendant. Upon an instrument so framed, I am of opinion that the party is not liable when the fund is taken away.

The other Judges concurred.

#### Judgment for the defendant (a).

(a) And see *Brett v. Brett*, 3 Ad-dams, 210, *post*, vol. iv. 108, 8. n. as to the effect of a recital in the preamble of a statute upon the construction of the enacting clauses. See also *Samson v. Bell*, 2 Campb.

39; *Wardens of St. Saviour's v. Bostock*, 2 N. R. 180; *Liverpool Water Works Company v. Atkinson*, 6 East, 507, 2 Smith 654; *Lord Arlington v. Merrick*, 2 Wms. Saund. 414, n. 5.

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of DICKENS and WARRICK, Bankrupts, v. PELLATT.

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ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees. Plea, non assumpsit. At the trial before Parke, J., at the last Devon Assizes (a), the following facts appeared. The bankrupts, being earthenware dealers at Plymouth, became indebted to the defendant, who is a glass and china man in London, and in November, 1826, executed a warrant of attorney to confess a judgment by *nil dicit*, at the suit of the defendant, for 400*l.*, with a defeasance thereon, declaring that it was given for securing payment of 215*l.* 9*s.* and interest, on the 23d of January, 1827. Judgment was entered up on this warrant of attorney on the 5th of March, 1827, as of the Hilary Term preceding, for 400*l.* debt, and 65*s.* costs. On the same day a writ of *feri facias* issued on this judgment to the sheriff of Devonshire, who, on the 7th of March, seized the goods of Dickens and Warrick, and continued in possession until the return day of the writ. The bankrupts paid different sums on account of the execution from time to time into the hands of the sheriff's officer, and on the 1st of May they paid him 60*l.*, which, with the former payments, made up the amount of the execution. On the 2d of May an act of bankruptcy was committed by Warrick, and by Dickens on the 5th of May. On the 11th of May, the under-sheriff, having refused to pay such sum of 222*l.* 12*s.* 6*d.* to the defendant, without an indemnity, defendant executed a bond to the sheriff, conditioned to indemnify him against such payment. On the 12th of May, a commission of bankrupt issued against Dickens and Warrick, under which they were duly declared bankrupts on the 14th of May. On the 19th of May the 222*l.* 12*s.* 6*d.*, after deducting 5*s.* 6*d.* for postages, was paid by the under-sheriff to the defendant's attor-

March 5, *A.* issues a *fi. fa.* against *B.* and *C.* upon a judgment by confession, returnable May 2. May 1, *B.* and *C.* pay the debt to the sheriff. *B.* commits an act of bankruptcy on May 2, and *C.* on May 5. May 11, a commission issues against *B.* and *C.* May 15, *A.* receives the debt from the sheriff. *A.* may hold the amount against the assignees of *B.* and *C.*

(a) Counsel for the plaintiff, *Wilde*, Serjt., and *Rogers*; for the defendant, *Merewether*, Serjt.



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ney, by whom it was afterwards paid over to the defendant. Upon these facts it was contended, on the part of the defendant, that the plaintiffs ought to be nonsuited on the ground that the execution was completely executed before the bankruptcy. The learned Judge, however, over-ruled the objection, and refused to reserve the point.

In Michaelmas term *C. F. Williams* obtained a rule *nisi* for a new trial ; against which,

*Rogers*, with whom was *Wilde*, Serjeant, now showed cause. In *Notley v. Buck* (a), Lord Tenterden says, " the intention of the legislature was to prevent the estates of bankrupts from being burthened with voluntary judgments. The words of the act, perhaps, go beyond the intention of its framers. The difficulty is as to the mode of giving effect to that intention. Upon the consideration of this case, it appears to us that the only satisfactory mode of giving effect to the act of parliament is, that the creditor, under these circumstances, should be prevented from receiving the monies produced from the sale of the goods taken in execution. If the creditor is allowed to receive the money, he will most frequently receive more than he is entitled to. If he is allowed to receive more money than he is entitled to, there must be some mode by which the assignees may recover it from him. The receipt of the money, in the first instance, by the creditor, where he is liable to refund, can be of no use to him if he is able to refund, and if he is not able, the object of the statute would be defeated. The safer course, therefore, appears to be, to say that he ought not to receive it, and if he ought not to receive and does receive, then he will have received money belonging not to himself, but to the assignees, and consequently he will be liable to an action at their suit for money had and received to their use. Taking this to be the true effect of the statute as to the execution creditor, what will be the duty of the

(a) *Ante*, ii. 68, 8 B. & C. 160.

sheriff having notice?" Here the defendant gave a bond of indemnity. His lordship then adds, "No other reasonable answer can be given to that question than to say, that it is his duty to pay the money to the assignees, to whom it does belong, and not to the execution creditor, to whom it does not belong. This being the sheriff's duty according to the statute, if he does pay the money to the creditor, he places himself in the ordinary situation of a man who, having received it, thinks fit to hand it over to a party who is not entitled to receive it." The sale was immaterial; the property in the goods was not changed by the sale, but by the seizure. [*Parke, J.* The sheriff has a special property in the goods, the defendant has the general property until the sale (a).] In *Clark v. Withers* (b) the Court said, that by the seizure the property was divested out of the defendant and in abeyance. If the sale were material, it would be in the power of the sheriff to give the property to which party he chooses. It is the duty of the sheriff to retain the money in his hands until he has ascertained to whom it belongs. [*Littledale, J.* At his own peril; for he is immediately liable to an action for money had and received.] It is his duty to bring the money into Court. In the *King v. Bird* (c), it was held, that on a *fieri facias* the sheriff may sell the goods, and if he pay the money to the party it is good, and the Court will allow of such return, because the plaintiff is thereby satisfied, although the writ run "*ita quod habeat coram nobis*," &c. The sheriff should hold the money as a ministerial officer, and pay it over as the Court may direct. Though there may be no danger from persons who are likely to fill the office of sheriff, it would give an opportunity to inferior officers to practise great frauds, if the conflicting interests of the assignees and the judgment creditor were to be determined by the fact of sale. In *Vesey v. Harris* (d),

(a) Mann. Exch. Prac. 2d ed. 44. in 20 H. 6, 24; and 21 H. 6, 71.

(b) 1 Salk. 322, 1st resolution. In P. 20 H. 6, fo. 24, pl. 5, the

(c) 1 Shower, 87. defendants pleaded to a *scire facias*

(d) Cro. Car. 328. The point is on the judgment that the plaintiff had formerly sued out a *fi. fa.*

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it was held to be a good plea that the debt had been levied

upon the same judgment, under which the sheriffs had levied the amount. It was objected that the defendants ought to have brought trespass against the sheriff, and not to have barred the plaintiff as by satisfaction. For the defendants, it was said that the plaintiff might have his action against the sheriff for not returning the writ, and not having the money in Court, and that therefore, if the defendants might sue the sheriff, he would be twice charged. But the Court held that it was unreasonable that the defendants should recover against the sheriff in respect of the damage sustained by them, because the money which was levied was not paid, and also that the plaintiff should charge him for his false delay. The case, however, appears to have been considered as one of difficulty, and was adjourned by *Cur. adv. vult.* And in the same term, P. 20, H. 6, fo. 25, pl. 13, the argument was renewed.

"*Yelverton.* Sir, it seems to me that this is not a plea; for matter of record cannot be avoided by averment. As if I declare upon an obligation, it is no plea to say that he owes nothing, but it is necessary to shew matter of as high record as the obligation is in proving it, as an acquittance, &c. So here the defendants are charged by a judgment which appeared within here of record, upon which we have sued this *scire facias*, which cannot be defeated by averment that the sheriff has delivered the money, unless he shew a record of this. And thus, sir, the defendants are not at any mischief, because they

can have action of trespass against the sheriff, and recover all in damages. Wherefore, &c.

"*Portington.* This averment is not absolutely contrary to the record, for our intent is, not to aver that the party is contented, but our plea is to give him action against the sheriff, because he has levied the money, which averment will not defeat the record. Wherefore, &c.

"*Newton,* (C. J. of C. P.) The money was well levied by the sheriff, because he had authority by writ of *fi. fa.*, &c.; then it is more reasonable that the plaintiff should have action against the sheriff than to award new execution against the defendants, from whom the money was lawfully levied once; and also the writ of *fi. fa.* directs that the sheriff should have the money, which he has not done; so he has disobeyed the command of the king, which is a contempt, in which case he shall make a fine to the king for this contempt, until the party be satisfied. And let us suppose that the sheriff takes a man by *ca. sa.*, now the judgment is executed by this taking; let us suppose that the sheriff lets him go afterwards, and then, after the year and day, the party for whom judgment was rendered sues *sci. fa.* against him who was taken, out of the same judgment to shew cause why he should not have execution, it seems to me that it is a good plea for him to shew how that his body was one time in execution, in order to drive the party to sue the sheriff. But *quare* of this plea, for it is not

by the sheriff upon *fi. fa.*, and in *Taylor v. Bekon* (a) the distinction was taken between payment under a *fi. fa.* and payment under a *ca. sa.*, where payment to the sheriff under a *fi. fa.* was held to discharge the debt.

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*C. F. Williams* and *Merewether*, Serjt., contrà. In *Dale v. Birch* (b) the Court held, that after a return of "*fi. fa. feci*," the sheriff is liable to an action for money had and received, without a demand for payment. [*Littledale*, J. That does not shew that an action would lie before the return (c).] Here the *fi. fa.* was returnable on the 2d of May, which was before the act of bankruptcy, and then the right

of record that he was taken, because the sheriff did not return the *capias*.

"*Ascough*, (J. of C. P.) If a *capias* in an action of debt be awarded, the words are *ita quod habeas corpus ejus hic*, in which case, although the sheriff take the body, and do not return the writ, still this shall not be understood a contempt to have attachment as above; and although it should be thus understood, still the plaintiff shall not recover his debt upon this attachment, but only for his delay, although the party who was taken shall have an action of false imprisonment against the sheriff; because, although the taking was lawful at first, still, when he did not certify this to the Court by the return of the writ, now is the taking wrongful. So the levying of the money in our case; inasmuch as the writ was not returned, the sheriff cannot justify by it. Wherefore the defendants can have good action against the sheriff.

"*Paston*, (J. of C. P.) This writ of *fi. fa.* was never entered on the roll before the return, and this is a marvellous course; but since it has

been the course, I do not speak any more of that. And in the case which has been put of a man taken by *ca. sa.*, when he is in ward the judgment is executed; but in our case the judgment is not executed until the money be paid to the party; wherefore in our case the plaintiff shall not have action against the sheriff, but shall resort wholly to his judgment, which is not executed; and although he recover by action against the sheriff all the money, as your intent is, still this shall not oust the defendants from having action against the sheriff, in which case he will be twice charged, which is inconvenient. For which reason it seems that this is no plea." In 21 *H. 6*, fo. 5, pl. 13, a respondeas ouster was awarded.

(a) 2 *Lev.* 203.

(b) 3 *Campb.* 347.

(c) In *Dale v. Birch* the plaintiff did not produce the original *fi. fa. facias* from the hands of the sheriff, but gave in evidence an examined copy; which shews that the *fi. fa. facias* was returned at least before the trial.

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to the money levied was vested in the judgment creditor. *Wymer v. Kemble* (a). It was a transfer by the sheriff to the judgment creditor.

BAYLEY, J.—If the debt were discharged by seizure only, *Notley v. Buck* would have been improperly decided. The distinction between *Notley v. Buck* and *Wymer v. Kemble* is, that in the latter case the money had reached the hands of the judgment creditor. If the sheriff is liable the original debt is destroyed. We do not entertain any doubt upon this case. But as it is stated that the same question is now depending before the Court of Exchequer, we do not, at present, decisively pronounce any rule. The 108th section takes away the right of certain judgment creditors having security at the time when the debtor becomes bankrupt. If it can be said that the defendant was a creditor having security at the time that the act of bankruptcy was committed, he came within the clause. If he was not then a creditor, but something had interfered to make him no creditor, the clause does not apply. Upon this joint commission, the assignees can only proceed upon an act affecting both the bankrupts. On the 2d of May the writ was returnable, the sheriff having received the whole of the money to satisfy the execution creditor. On that day, it was the duty of the sheriff to have the money in Court, or to pay it over; but his neglect of duty cannot affect the rights of other parties. Payment of the money would have discharged the debtor; but I think that seizure followed by a conversion of the goods into money would equally discharge the debtor. *Notley v. Buck* differs from the present case. There the seizure was before the act of bankruptcy; but before sale, and before any money had passed, an act of bankruptcy was committed. Between seizure and sale, the judgment creditor is a creditor holding security. Until the sheriff has converted the goods by sale, the general property of the goods is in the execution debtor. Up to that period,

(a) 6 B. & C. 479.

therefore, the party remains a creditor, and the debt is not extinguished. The defendant in execution has a right to go to the sheriff and require the goods to be restored to him on payment of the money. That right remains entire until the sheriff has sold, the general property remaining in the debtor, though the sheriff has a special property. This is sufficient to suspend the right to sue out execution, but until actual satisfaction, by conversion of the goods into money, the debt is not extinguished. If the party continues a creditor until the goods are converted into money, *Notley v. Buck* is rightly decided, since the judgment creditor remained a creditor on security. Here the defendant is not within the clause. If in the case in the Exchequer that Court come to a different decision, the proper course will be to direct a second argument.

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LITLEDAL, J.—My present opinion is against the plaintiffs. The only doubt in the case arises upon the 108th section of the late act. The seizure was before the bankruptcy, and under the statute of *James (a)* it has always been held, that although there be no sale, the execution is, as against the assignees, completed by seizure, because being an entire thing, it cannot be stopped by the intervention of an act of bankruptcy (*b*). The latter part of the section creates the doubt. What is the meaning of that clause, “Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid ratably with such creditors.” This clause cannot apply to all persons who have at any time been creditors of the bankrupt. Therefore the Courts have considered this proviso as restrained by the words “having security,” in the former part of the section. The judgment

(a) 21 Jac. cap. 19, sect. 9.

in *Clark v. Withers*, 2 Lord Ray-

(b) Vide Lord Holt's judgment

mond, 1072; 1 Salk. 322.

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gives security to a seizure under a *fi. fa.* It may be a question whether the security was here entirely divested, or only *sub modo*. No creditor, who, at the time of the act of bankruptcy, continues to hold security, would be entitled to avail himself of the execution. But does the defendant here hold any security? The seizure was on the 7th of March. The defendant had security up to the 1st of May. The writ was returnable on the 2d of May, on which day an act of bankruptcy was committed by one of the bankrupts only. On that day it was the duty of the sheriff to pay the money over to the execution creditor. On that day, therefore, the defendant ceased to be a creditor having security. The security was *junctus officio*. The money itself was in the defendant's hands, or in the hands of the sheriff for his use. I am pretty sure there are authorities to shew that as soon as the money is received, and before the return of the writ, an action for money had and received will lie against the sheriff (*a*).

PARKE, J.—At present I entertain no doubt upon this case. The second branch of the 108th section seems to deprive no execution creditor of his remedy, unless at the time of the act of bankruptcy he was a creditor having security, or seeking to avail himself of the security. When money is paid to the sheriff, he becomes the debtor to the execution creditor, *Perkinson v. Gilford* (*b*). The execution debtor is therefore discharged, though a question might arise whether an action of debt would lie against the sheriff until the writ was returnable. In *Clark v. Withers* (*c*), Lord Hutt says, that “the defendant, having lost his goods, may plead levied by *fi. fa.* in bar to an action of debt, or *sci. fa.* on the judgment. And to this purpose is the case of *Atkinson v. Atkinson*, 3 Cro. (*d*) 390, where, in a *sci. fa.*,

(*a*) Vide *Perkinson v. Gilford*, Cro. Car. 539; *Cockram v. Welbye*, 2 Shower, 79; *Speake v. Richards*, ib. 281. And see *Cator v. Stokes*, 1 M. & S. 599.

(*b*) Cro. Car. 539.

(*c*) 2 Ld. Raym. 1072.

(*d*) Cro. El. This volume having been published after those which contain the reports of cases in the two subsequent reigns, was formerly cited as 3 Cro.

upon a judgment in detinue, the defendant pleaded, that upon a *distringas* (a) upon that judgment to the sheriff, he delivered the goods to the sheriff, and that was held to be a good plea; and the seizing of the goods upon the *distringas* is the same thing as levying the money upon a *feri facias* in other cases." In *Atkinson v. Atkinson*, however, the money had been paid to the sheriff (b). In that case there can be no doubt; and that was the case here. Then, secondly, is he a creditor seeking to avail himself of the execution? It is said that he must be so considered, because he cannot recover against the sheriff the money levied without proving the execution; but though he may avail himself of the execution as against the sheriff, he does not do so to the prejudice of other fair creditors of the bankrupt, which is the only use of the execution prohibited by the statute.

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The decision in the Court of Exchequer being conformable to the opinion expressed above, the Court afterwards made the rule for a new trial absolute.

#### Rule absolute.

(a) i. e. a *distringas ad deliberandum*; for which process see *Officina Brevium*, 308, 328; 1 Brown, Entries, 147; Brownlow, Brev. Jud. 292, 308; Townsend, Book of Judgments, 82; Mann. Exch. Pract. App. 297, 1st edit.

(b) In *Atkinson v. Atkinson*, the defendant pleaded to the *sci. fa.* "that upon a writ of *distringas* awarded to the sheriff upon that judgment, he delivered such goods, (i. e. part of the goods recovered,) to the sheriff; and for the residue,

that they were appraised at so much by an inquisition taken by the sheriff, and that he delivered the money to the sheriff, but he doth not aver this matter to be returned by the sheriff." This plea, therefore, would have been bad, unless the mere redelivery of the goods upon the *distringas ad deliberandum* had been an answer to part as well as the payment of money, as the amount of the appraised value of the goods not redelivered, an answer to the residue.





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## The KING v. The INHABITANTS of ROSLISTON.

"Let him stop what time he will, I will give him satisfaction, if not in money in clothes." The sessions are at liberty to infer that this was not a general hiring.

THIS was an appeal against an order for the removal of *Richard Taylor* and *Catherine* his wife, and one infant daughter, (not christened,) from the parish of St. Michael, in the city and county of the city of Lichfield, to Rosliston, in the county of Derby. The Court of Quarter Sessions for the city and county of the city of Lichfield confirmed the order, subject to the opinion of this Court upon the following case:

*Richard Taylor*, the pauper, on the 6th February, 1817, and when about thirteen or fourteen years of age, went with his mother to *Joseph Slater*, a victualler and farmer, living in the parish of Chad, otherwise Stowe, within the city and county of the city of Lichfield. The pauper's mother asked *Slater* if he wanted a boy; he said "Yes." She then asked what wages he would give. *Slater* said, "Let him (the pauper) stop what time he will, I will give him satisfaction, if not in money in clothes." The pauper went into the service a few days afterwards. He looked after the horses, cows and sheep, and attended to the general business of the farm. *Slater* gave the pauper his board, some clothing, and also some money at different times; and the pauper continued in such service in St. Chad's parish for thirteen months, when he ran away, because *Slater* beat him. *Slater* never sent after the pauper, nor did the pauper ever offer to return to *Slater's* service; but a few days after he had run away, he went to *Slater's* for his hat, which *Slater* refused to give him. The pauper, on his cross-examination by the respondent's counsel, stated, that at the time of hiring, *Slater* did not say that he (the pauper) might go away when he pleased, or that *Slater* might turn him away when he pleased. After the expiration of a year or more from the original hiring, the pauper's mother went to *Slater's* house to make an agreement, but he was out, and no new agreement was made. In 1827, and before the

pauper was removed, and whilst the pauper, his wife and child were living in St. Michael's parish, he applied to the overseer of the parish of St. Chad, otherwise Stowe, for relief, and, after being examined as to his settlement, was twice relieved by such overseers.

The Court of Quarter Sessions were of opinion that there was no general hiring in the parish of Saint Chad, otherwise Stowe.

*Shutt*, in support of the order of sessions. There can be no general hiring where time is mentioned. General and indefinite hirings are not synonymous. An indefinite hiring excludes a general hiring; *The King v. Christ's Parish, York* (a). The words used by the master here, as as well as there, must mean whatever time he chose.

*Whately*, contra. The distinction between general and indefinite hirings is not very intelligible. *The King v. Great Bowden* (b) shews that such a hiring as the present is general, unless that intention be controlled by particular words. There is nothing here to shew that the pauper might have been turned away. [*Parke, J.* Is not this a question of fact, and were there not premises from which the sessions might draw the conclusion at which they have arrived? *Bayley, J.* The question is, whether the sessions might not infer that the hiring was not general.] It is submitted that the premises did not warrant the conclusion? [*Bayley, J.* In *The King v. Trowbridge* (c), the words were "to bide as long as he pleased." Here the master could have dismissed him when he pleased.] *The King v. Wincanton* (d). This was followed up by *The King v. Stockbridge* (e), and *The King v. Worfield* (f), and *The King v. Great Bowden* (g).

(a) 5 D. & R. 314; 3 B. & C. 459.

(b) *Ante*, i. 13; 7 B. & C. 249.

(c) Cited by *Bayley, J.*, in *Rex v. Christ's Parish, York*, 5 D. & R. 317; 3 B. & C. 462.

(d) Burr. S. C. 295.

(e) *Ibid.* 758.

(f) 5 T. R. 506.

(g) *Ante*, i. 13; 7 B. & C. 249.

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BAYLEY, J.—If, according to what passes at the time of the hiring, the master may turn away the servant, or the servant may leave the master at any time, no settlement is gained. This is perfectly consistent with the case which we have decided this morning (a). The question is not what inference I should have drawn, but whether the justices were at liberty to infer that the servant might leave at any time. If he was at liberty, no settlement was gained.

LITTTLEDALE, J., and PARKE, J., concurred.

Order of Sessions confirmed.

(a) *Rex v. St. Andrew's, Cambridge, ante.*

—◆—

The KING v. The Inhabitants of CROYLAND.

An act for draining fen-lands vests 5000 acres in trustees, as a recompense for the undertakers, and directs that inhabitants upon any part of the 5000 acres, unable to maintain themselves, shall be maintained by the trustees, and not by the parishes. The 5000 acres become an incorporated district, but are not rendered extra-parochial; and hiring and service thereon gains a settlement, where the service is performed either in the particular parish or in the district generally.

AN order of removal of *Ruth Reed* and children from Spalding to Croyland, both in Lincolnshire, was confirmed by the Court of Quarter Sessions, subject to the opinion of the Court of King's Bench on the following case:—

The defendants proved a settlement in Croyland. In answer to which, the appellants proved a hiring and service for a year of the plaintiff's husband, in a certain part of Deeping Fen, mentioned in the 37th section of an act, 16 & 17 Car. 2, for the draining of that and other fens in Lincolnshire, and therein described as containing 5000 acres, set apart for an additional recompense to certain trustees therein mentioned. At the present time there are no overseers for Deeping Fen, but overseers were appointed for that place at intervals, but not *regularly*, from 1790 to 1810, since which last time no overseers have been appointed; and until the last eight or nine years a workhouse was kept

and maintained in the said Deeping Fen for the residence and management of the paupers residing in the said fen. The said act of 16 & 17 *Car.* 2, was to be considered as part of the case. No part of the act appeared material, or was alluded to, except the first section, which mentioned *towns* as existing in the said fen, and the following section, 37, of the act above alluded to, "And be it enacted, by the authority aforesaid, that the said trustees, their heirs and assigns, or the survivor of them, or any of their tenants, farmers or groundholders, of any part of the said third part, or of the said fen, or of the said 5000 acres, shall not have, at any time hereafter, use, or claim any common of pasture, or other commonage of pasturing, in any part of the remainder of the said fens, nor any of them, nor in the north Fen of Pinchbeck and Spalding, nor any part thereof, by virtue or pretence of his or her residence there. But all and every the inhabitants that may hereafter be upon any part of the said third part, or upon any part of the said 5000 acres, and are not able to maintain themselves shall be maintained and kept by the said trustees, their heirs and assigns, and the survivor of them, and never become chargeable in any kind to all or any the respective *parishes* wherein such inhabitant or inhabitants shall reside or dwell, any statute to the contrary, &c."

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*Macdowal*, in support of order of Quarter Sessions. There are no churchwardens or overseers now existing in Deeping Fen, though overseers have been appointed at intervals, that is, persons called overseers in the special case. But in reality this Deeping Fen is extra-parochial, and, therefore, the justices could not remove them, nor could he gain any settlement there. [*Littledale, J.* It is not stated whether it is extra-parochial, or a parish, or what]. If even it is not extra-parochial, still by the above section, 37, the parishes are not to be charged, but the trustees, and the justices of the peace cannot direct an order to them, their order must be to the churchwardens or overseers.

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*Bolland and Burnaby*, contra. It is immaterial in this case whether Deeping Fen is extra-parochial or not, for *quâcunque via datâ*, the pauper should have been removed there, and not to Croyland, for that was not his last legal settlement, inasmuch as the hiring and service in Deeping Fen supersedes the settlement in Croyland. It does not appear by the case that this is extra-parochial, and in truth it is not, but within the parish of Deeping; all that appears to the Court as to this point is from the act of parliament, and in s. 37 the word *parishes* is introduced, from which it must be inferred that these 5000 acres were within a parish; and therefore the justices should have removed to the parish of Deeping; and the proper course would be, if there are no overseers, to apply to the justices to appoint them. If, however, it be extra-parochial, still the parish of Croyland is not bound to maintain the pauper, but the trustees of Deeping Fen under the 37 sect. of the act, and Spalding should either have applied to magistrates to obtain an order of maintenance of children, or otherwise they should have obtained an order of removal and forced the trustees to have received the paupers. The only case in point at all is *Rex v. Saughton on the Hill* (a), and that is applicable to the first point, and *Rex v. Tamworth* (b) is an authority as to the second. The settlement in Croyland is equally superseded whether a settlement was gained in Deeping Fen or the trustees were bound to maintain him under the act. Besides he was not strictly chargeable to Spalding, for the 37th section expressly provides that he shall not be chargeable, and the parish of Spalding were not bound to relieve him, as in the case of men residing under certificates.

BAYLEY, J.—It seems to me in this case that the removal to Croyland cannot be supported, and that the order of sessions must be quashed. The removal to Croyland must be upon the principle that the parish of Croyland were bound to maintain him. Now the pauper's husband

(a) 2 B. & A. 102.

(b) Cald. 28.

had done that in Deeping Fen which if done in any other place would have given him a settlement in such place. Now there is nothing in the case or in the act of parliament to shew that Deeping Fen is extra-parochial, and the contrary is to be presumed, namely, that it is situated within a parish, and in that view clearly the pauper ought to have been removed there, but the repellants rely upon a clause in the act of parliament: now what is the fair construction of that clause? it is this, if the pauper is dwelling there, or if he does any act therein whereby he could gain a settlement, he is to be maintained by the trustees, not that he shall not belong to that parish; to enforce this, an application may be made by the parish wherein the place is situated, or probably by application of the parish wherein he may be resident. The true construction of the act is not that the settlement is superseded, but that the trustees and not the parish are to bear the expense of the maintenance, therefore the order of sessions must be quashed.

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LITLEDALE, J.—I am of the same opinion. We must take these fens to be in some parish, for by the first part of the act there is mention made of *towns* in them before the inclosure, which shews that they were not then uninhabited; besides, in the 37th section mention is made of inhabitants residing in *parishes*. Now if he gained a settlement in that parish, the settlement in Croyland is superseded. A different question would arise if it could be clearly proved that Deeping Fen is extra-parochial and no vill, for then no settlement could be gained, nor could he be removed there; and it may be a question whether the trustees under the 37th section of the act could be called upon to maintain him unless he were resident there. I think they could not; however it is not necessary to decide that.

PARKE, J.—The pauper had a legal right to be maintained either by the parish in which the fen is situate, or by the trustees under the act. It is unnecessary to decide by

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which; for in either case the removal ought not to have been made to Croyland.

Order of Sessions quashed.

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The KING v. The Inhabitants of RAWDEN.

Parolevidence  
 as to the party  
 to whom a de-  
 mise is made,  
 not admissible  
 where the  
 agreement for  
 the demise  
 was in writing.

BY an order of two justices, *George Clayforth* and *Sarah* his wife, and *Hannah* and *James* their children, were removed from the township of Idle, in the West Riding of Yorkshire, to the township of Rawden in the said Riding. Upon appeal, the sessions confirmed the order, subject to the opinion of the Court on the following case:—

The respondents proved a settlement in the appellant's township. The appellants then set up a subsequent settlement gained in the respondent's township, by the pauper's having been rated, and having actually paid the rates in respect of a tenement of the annual value of 10*l.* 10*s.* in that township. It appeared that in December, 1823, the pauper began to occupy the tenement which was the property of *Joshua Compton*, Esq., that he occupied it for a twelve month, paid the rent for it and also the rates, during all which time he resided in that township. In answer to this, the respondents insisted that the pauper did not take the tenement of *Mr. Compton* solely, but jointly with his father and father-in-law; and to prove this, they called *Mr. Robinson*, who was *Mr. Compton's* steward at that time. He stated that he did not know who occupied the tenement in question. He was then asked by the counsel for the respondents, who it was to whom he had let the tenement, and who were the tenants. Whereupon the appellants' counsel interposed, and asked him whether there was not an agreement in writing, and on his admitting that there was, they objected that parol evidence of the letting and tenancy could not be received. The Court, however, permitted the question to be put, and the witness stated that he had let the tenement to the pauper,

the pauper's father and father-in-law; that they were the tenants, and that they jointly delivered a notice to quit, but that he could not say whether this notice was signed with one or more names. Upon this evidence, the Court of Sessions confirmed the order. If the Court of King's Bench shall be of opinion this evidence was improperly received, then the order of sessions is to be set aside.

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*Blackburn and Dundas. The King v. The Inhabitants of the Holy Trinity and St. Margaret's, Hull* (a) is directly in point. There it was decided that parol evidence of the fact of tenancy is admissible, although it appear that the tenant holds under a written contract. Here the witness was called to rebut the presumption raised by the payment of rates, that the pauper paid them in respect of a tenement of 10*l.* a year. This case is directly within the reason of the judgment in *Rex v. Hull* as reported in 1 M. & R. The same principle is to be found in *Butcher v. Jarratt* (b).

*Starkie and Milner* were stopped by the Court.

BAYLEY, J.—The difficulty consists in admitting parol evidence, there being a written agreement. This is a case where *primâ facie* it cannot be asked to whom the property was let. This distinguishes the present case from *Rex v. Hull*.

LITLEDALE, J., concurred.

PARKE, J.—The respondents wished to prove not who occupied the tenement, but to whom it was let. This could not be done without the agreement. It was not competent to them to show to whom the land was let, except by the instrument letting it.

Order of Sessions quashed (c).

(a) 7 B. & C. 611; 1 M. & R. 444.

(b) 3 B. & P. 143.

(c) *Vide* 1 M. & R. 446, (c), where



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it seems to have been considered that proof of the fact of tenancy stood upon the same footing as proof of the terms of the holding. By 3 & 4 W. & M. c. 11, s. 6, any person coming to inhabit in any parish, charged with and paying his share towards the public taxes of the said parish, shall gain a settle-

ment. Here the pauper occupied the tenement in question for a twelvemonth, paid the rent, and also the rates for it. Query, whether, even supposing that demise to be joint, a settlement was not acquired in Idle. *Vide Rex v. St. Dunstan's*, 7 D. & R. 178; 4 B. & C. 686.

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DOE, on the demise of WARREN, v. AARON BRAY.

A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register made at a subsequent period by a succeeding incumbent, founded upon such minute.

**EJECTMENT** for lands in Castle Morton, in the county of Worcester. At the trial before *Vaughan*, B. at the Worcester Spring Assizes, 1828 (a), a *prima facie* title having been shown on the part of the lessor of the plaintiff, the defendant set up a title derived from *John Bray*. To prove that he was the legitimate son of *John Bray*, the defendant produced the parish register of Castle Morton, for 1776, which, under the head of "Baptisms," contained the following entry: "6th February, *Aaron*, son of *John* and *Elizabeth Bray*." This entry was made in June, 1777, by a clergyman, who did not become rector of Castle Morton until the death of the prior incumbent in the early part of that year. In 1776, the latter being infirm, no regular entries of baptisms were made in the parish books, but a person who was the parish clerk during the incumbencies of both rectors, wrote memoranda of these occurrences on slips of paper, from one of which the second rector made the above entry. On the part of the plaintiff it was contended, that neither the minutes of the clerk, nor the entries in the register prepared from such minutes, were evidence. The learned Judge overruled the objection, the minutes and register were received, admitted, and read, and a verdict was found

(a) Counsel for the plaintiff, *Campbell* and *R. V. Richards*; for the defendant, *Taunton* and *Maule*.

for the defendant. In the following term, *Taunton* obtained a rule to set aside this verdict, on the ground that the evidence was not admissible, against which,

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*Campbell* and *R. V. Richards* now shewed cause. The entry in the register was *primâ facie* evidence; nor is its authority destroyed by shewing it to have been made by a person who was not the incumbent at the time the baptism took place. [*Littledale, J.* By the 70th Canon (a), the names of all persons baptized are to be entered in the register at the end of every week. *Parke, J.* A register is evidence as a document made up by a public officer, whose duty it is to prepare such a document; here the entry is made by a person wholly unconnected with the parish at the time the baptism is supposed to have taken place.] But supposing this circumstance to take away from the authority of the entry, its credit is restored by shewing that it was prepared from minutes furnished by a party whose office required that he should be present when the ceremony was performed. If the clerk had made the entry in the lifetime of *A.*, the register would have been evidence of the baptism; so here, where it is made from minutes drawn up by the clerk in the lifetime of *A.* [*Bayley, J.* Where the clerk makes the entry in the lifetime of the minister, the Court would presume that the former was authorized by the latter to make the entry; but an entry made after his death cannot be presumed to have been made by his authority.]

*Taunton* and *Maule*, contra, were stopped by the Court.

BAYLEY, J.—We are of opinion that this rule must be made absolute. Entries in parish registers should be made promptly, and they should be prepared by the persons whom the law has appointed for that purpose. Here the entry was delayed for a year and a half, and until after the death of the incumbent, when it was made by a person

(a) 3 Burn. Eccl. Law, 290.

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acting merely upon the information of the clerk. Then with regard to the second point, as it was not the duty of the clerk to make such entries, his minutes must be considered as mere private memoranda. In *May v. May (a)*, the day-book in which the original entries were made, and from which they were posted into the register once in three weeks, was held to be inadmissible. And the editor of Burn's Ecclesiastical Law makes an observation to the same effect (b). So in *Newham v. Raithley (c)*, it was held that the copy of a register kept

(a) 2 Stra. 1072; Bull. N.P. 112.

(b) 3 Burn, E. L. 493.

(c) 1 Phillimore, 315. In that case it was said by the learned judge, Sir John Nicholl, that the register itself might be evidence to a certain extent at the hearing. No notice appears to have been taken of statute 25 Geo. 3, c. 75, which imposed a stamp duty upon "the registers of births, burials, and christenings of his majesty's protestant subjects dissenting from the church of England," and may perhaps be considered as a legislative recognition of such registers. The duty had been imposed upon parochial registers, and had been extended to the registers of quakers by 23 Geo. 3, c. 67, s. 8. All these duties have been since repealed. In *Huet v. Le Mesurier*, 1 Cox, 275, a register kept in Guernsey appears to have been rejected, as not having been kept under a sufficient ecclesiastical authority.

*Ex parte Taylor*, 1 Jac. & Walk. 483. "This was a petition for payment of a legacy that had been invested in the funds in the name of the accountant-general, under the statute 36 Geo. 3, c. 52,

s. 32, the legatee having attained 21. To prove his age an examined copy of an entry in the register of the births of dissenters' children, kept at Dr. Williams's Library in Redcross-street, was produced. The Master of the Rolls (Sir W. Grant) thought it was not evidence that the Court could act on." The institution in which that register was kept is a library founded by Dr. Daniel Williams, a presbyterian minister, in the beginning of the last century, for the use of ministers of the three denominations into which the dissenting body, with the exception of the quakers, was then divided, presbyterians, independents, and baptists. From the year 1740, protestant dissenters of the three denominations have registered the births of their children at this library. The register is entered in books prepared from certificates on parchment, which are also preserved in the library. Until the above decision in *ex parte Taylor*, the certificates were in the following form:—

"These are to certify that A., the son of B. D., and C. his wife, who was the daughter of E. F., was born at X., in the parish of Y.,

at a dissenting chapel, could not be pleaded in evidence in the Ecclesiastical Court, on the ground that such a register, not being a public document in official custody, must be considered as a private memorandum.

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Rule absolute (a).

in the county of Z., on the  
day of , in the year ,  
at whose birth we were present.  
(Signed) G. H.  
I. K.

"We do certify that the above-  
named A. D. is our son, and  
was born at the time and place  
above mentioned.

(Signed) B. D.  
C. D."

After that decision it was considered that the certificate was available only as a declaration by the parent, and equivalent to an entry by a parent in a Bible, Prayer Book, &c.; and in order to give it more force as such declaration, the following form is now adopted:—

"Dated the day of 18

"This is to certify and declare, that A., the son of B. D., of X., in the county of Y., and C. his wife, (who was the daughter of E. F., of , in the county of Z.) was born at the house of the said B. D., No. , street, in the county of Y., on the day of 18 .

B. D. } The parents above  
C. D. } named.

"We certify and declare that we were present at the birth of the child above mentioned, and that such birth took place at the time and place aforesaid.

G. H., of , spinster, aunt to  
the child.

I. K., of , surgeon."

(a) By 52 Geo. 3, c. 146, it is

enacted, sect. 1, that registers of public and private baptisms, marriages and burials, solemnized according to the rites of the united Church of England and Ireland, within all churches or chapelries in England, shall be kept by the rector, &c. in books of parchment, or of durable paper.

In France, every birth must be communicated, within three days of the event, to the civil authorities, who are to make a full and minute record of the occurrence.

"Les déclarations de naissance seront faites, dans les trois jours de l'accouchement, à l'officier de l'état civil du lieu: l'enfant lui sera présenté. La naissance de l'enfant sera déclarée par le père ou, à défaut du père, par les docteurs en médecine ou en chirurgie, sages-femmes, officiers de santé, ou autres personnes qui auront assisté à l'accouchement; et lorsque la mère sera accouchée hors de son domicile, par la personne chez qui elle sera accouchée. L'acte de naissance sera rédigé de suite, en présence de deux témoins.— L'acte de naissance énoncera le jour, l'heure, et le lieu de la naissance, le sexe de l'enfant et les prénoms qui lui seront donnés, les prénoms, noms, profession, et domicile des père et mère, et ceux des témoins." Code Napoléon, numm. 55, 56, 57. Two copies of every entry of births, (as also of marriages

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and burials,) are made, and every leaf is signed by the president of the tribunal de première instance. At the end of each year the registers are closed by the mayor, and one copy is deposited in the archives of the mayoralty, and the other at the register-office of the tribunal de première instance.

Some provision of the like nature was attempted to be introduced into this country when the above statute was under discussion. It was urged that the parish register of baptisms embraced only one class of the community, and would, therefore, often afford little or no assistance in tracing a pedigree; and that supposing all classes to be included, the register gave no other information as to the period of the birth than that the party must have been born before the date of the entry in the register. It was, however, considered to be a hardship on the clergy to deprive them of the privilege of registering the baptisms of persons within their own communion, and that it would be degrading them to require that they should make entries with respect to the children of persons who were not within the pale of the established church.

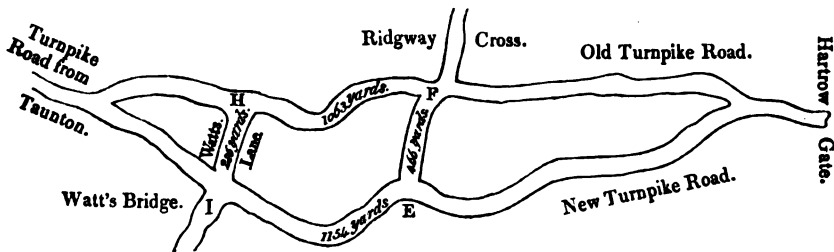
With respect to the three important events of birth, marriage, and death, the legal public evidence appears to stand thus:—The period of birth is to be sought for by

the inspection of one or more out of about 10,000 parish registers, kept by persons unused to the minutiae of accurate and formal entries, embracing about one half only of the population, and throwing no other light upon the period of birth of the party whose name is there recorded, than by proving that he was alive on a particular day, any accompanying memorandum as to the day of the birth being inadmissible. With respect to marriages, however, the registers are more satisfactory. They extend to all sects except two, (Quakers and Jews,) whose peculiarities will in general prevent any mistake in searching for the evidence of their marriage. There exists no register of deaths, but the interval between death and sepulture seldom raises any legal question; and therefore with respect to those who are buried by the ministers of the established church, we have a register which, if regularly kept and easily accessible, would answer every purpose of a register of deaths. The portion of the community whose interments are thus registered exceeds that whose baptisms are to be found in the parochial registers, inasmuch as many dissenters are buried in our public cemeteries, who either reject the rite of baptism, or receive it from ministers of their own persuasion, whether as children or as adults.

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## The KING v. WINTER.

THE following order was made by two justices of the peace:—



Somerset, to wit. We, Francis Popham, Esq., and Joseph Guerin, clerk, two of his Majesty's Justices of the Peace for the said county, at a special sessions for the highways held at the Lethbridge Arms Inn, in the parish of Bishop's Lydeard, in the hundred of Kingsbury West, in the said county, on the 11th day of December, 1827, having upon view found that a certain part of a highway, within the said parish of Bishop's Lydeard, in the said hundred and county, called Watt's Lane, otherwise called Sandy Lane, lying between the road described in the plan hereunto annexed, as the new line of turnpike road from Taunton to Hartrow-Gate, in the parish of Stogumber, in the said county, at or near a certain bridge called Watt's Bridge, marked in the said plan with the letter I, and the public highway heretofore part of the turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a certain dwelling house in the occupation of James Markes, marked on the said plan with the letter H, for the length of two hundred and eighty six yards or thereabouts, and particularly described in the said plan hereunto annexed, may be diverted and turned so as to make the same more commodious to the public; and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of

An order for diverting and stopping up a highway, and substituting for it a new road is bad, unless it appear that the public acquire as permanent a right in the latter as they had in the former.

*Seemle*, that this must appear on the face of the order.

*Seemle*, that the order should shew a contract with the owner of the land over which the new road is to be made.

*Seemle*, that upon the diversion of a highway, it cannot be continued for foot passengers only.

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Sir Thomas Buckler Lethbridge, of Sandhill Park, in the said county, Baronet, lying between the said new line of turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a certain turning in the said last mentioned turnpike road, in the parish of Ash Priors in the said county, marked on the said plan with the letter E, and the said public highway, heretofore part of the turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a place called the Cross at Ridgway, otherwise called Ash Cross, in the said parish of Bishop's Lydeard, in the said county, marked on the said plan with the letter F, of the length of 462 yards or thereabouts, and of the breadth of sixteen feet or thereabouts, particularly described in the said plan hereunto annexed, and having received evidence of the consent of the said Sir T. B. Lethbridge to the said new highway being made through his lands and grounds hereinbefore described, by writing under his hand and seal, in consideration of the said part of the said old highway, hereby ordered to be diverted and turned, being sold, exchanged and to be vested in him (saving always and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway, hereby ordered to be diverted and turned, according to the ancient usage in that respect); we do hereby order that the said last mentioned highway be diverted and turned through the lands aforesaid; and when such new highway shall be properly made and completed, and put in good condition and repair, and fit for the reception of travellers, and so certified by two of his Majesty's justices of the peace in and for the said county of Somerset, upon view thereof, and after such certificate shall have been returned to the clerk of the peace of the said county, and by him enrolled amongst the records of the court of quarter sessions, at the general quarter sessions of the peace to be holden in and for the said county, next after the general quarter sessions of the peace in and for the said county, at which this our order shall have been confirmed or enrolled, pursuant to the directions of the statute

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in that case made and provided; we do hereby order the said part of the said old highway, hereby ordered to be diverted and turned, being of the length of two hundred and eighty six yards or thereabouts, and of the breadth of twelve feet or thereabouts, upon a medium, as appears by the said plan, to be stopped up, subject to and saving always and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway so hereby ordered to be turned and stopped up, according to the ancient usage in that respect. And whereas the said Sir T. B. Lethbridge hath consented as aforesaid to the making and continuing of the said new highway through his lands, in consideration that the said part of the said old highway, hereby ordered to be diverted and turned and stopped up, be sold and exchanged and vested in him; saving always and reserving nevertheless as aforesaid; we do hereby order that the said lands, ground, and soil of the said Sir T. B. Lethbridge, for the said new highway hereby ordered to be made as aforesaid, be purchased by the sale, disposal, and exchange of the said part of the said old highway, hereby ordered to be diverted and turned and stopped up, and the same to be vested in the said Sir T. B. Lethbridge, subject and saving always and reserving nevertheless as aforesaid; and we do hereby approve and direct that the surveyors of the highways of the said parish of Bishop's Lydeard do and shall (a) make an agreement with the said Sir T. B. Lethbridge, being the person seised, possessed of, and interested in the said lands, ground, and soil through which the said highway, hereby ordered to be diverted and turned, is hereby ordered to and will go, for the recompense to be made for such ground and for the making of such new ditches and fences as shall be necessary by the sale, disposal, and exchange to and with the said Sir T. B. Lethbridge of the said part of the said old highway hereby ordered to be diverted and turned and stopped up, and the same being

(a) *Post*, 436, (c).



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vested in the said Sir T. B. Lethbridge, subject and saving always, and reserving nevertheless, as aforesaid. Given, &c.

On appeal, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court whether the order could be legally made under the statute 55 Geo. 3, c. 68, inasmuch as the intended new road from E. to F. did not either commence or terminate at the same points as the road to be stopped up, the distance between I. and E. being 1154 yards, and between H. and F. 1063 yards. And also, inasmuch as the highway from F. to H. was one of the roads included in the act of 3 Geo. 4, c. lxxv. for repealing several acts passed for repairing roads leading to the town of Bridgewater in the county of Somerset, and other roads therein mentioned, so far as the said act related to the roads leading to the said town, and for consolidating and comprising the same in one act.

*Brougham, C. F. Williams, Cabbell, and F. N. Rogers,* (with whom was Sir *J. Scarlett*), in support of the order. It is objected that the new road is more circuitous than the old, and that the termini of the two roads are not the same (a). The comparative nearness of the new line of road was matter entirely for the consideration of the magistrates. When a highway is diverted, the way directed by the order to be used may consist of road partly old and partly new. *De Ponthieu v. Pennyfather* (b). [*Bayley, J.* That was not a case in this Court as to the validity of an order. No bargain is stated. Sir Thomas Lethbridge is to have the land upon terms which may be agreed on (c).] He is bound. [*Bayley, J.* No. If the land which Sir Thomas Lethbridge acquires by the exchange be of more value than that which he gives up, *interest parochiæ* that the price be ascertained.] Lord Coke says, (d) "If *A. pro consilio impenso*, &c., make a feoffment or a lease for life of an acre, or (if he make such feoffment or lease) *pro unâ*

(a) No judgment was given upon either of these points.

(b) Taunt. 634; 1 Marsh. 261.

(c) *Ante*, 435.

(d) Co. Litt. 203 a.

acrá terræ, &c., albeit he denieth him counsel, or that the acre be evicted, yet A. shall not re-enter; for in this case there ought to be legal word of condition or qualification, for the cause or consideration shall not avoid the state of the feoffee." So here, the dedication to the public of the new road will not be defeated upon the expiration of the turnpike act, which was the cause or the occasion of the dedication. The third question raised, is upon the construction of the Bridgewater act. [*Bayley, J.* You may speak to that afterwards if it shall become necessary. Suppose the act, under which the turnpike road was diverted, to say that the new road shall be a public road for twenty-one years, what authority or reason is there for saying, that the new road shall be a highway afterwards?] By 3 Geo. 4, c. 126, s. 88, when any turnpike road shall be diverted and turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be deemed and taken to be a common highway: and by sect. 4 all the provisions in that act are extended to private acts. [*Bayley, J.* If by the turnpike act, the road became a highway reparable by the parish, it would remain a highway whilst the act continued, and the proprietors of the soil would be at liberty to take the land for their own purposes, and to obstruct the public. Here the justices have obstructed. But the public are entitled to have a perpetual road from I. to H. No consent appears on the face of the case permitting the public to pass from I. to E. That right, therefore, must depend upon the act. *Littledale, J.* The case appears to be imperfectly stated. Formerly there was a road from I. through by H. to F. If the new turnpike road from I. to E. was made by virtue of an order of the commissioners, it would become a common highway under the express provision of 3 Geo. 4, c. 126, s. 98. If you had an order, it appears to me that the road from I. to E. would be well substituted for the road from H. to F. *Parke, J.* The difficulty is stated in the special case.] It appears upon the face of the special case, and also upon the plan. The act of 3 Geo. 4, c. 126,

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embodies all the former acts. If, therefore, it appears that the road from I. to E. is a new road, it must have been made under the provisions of that act.

*Tindal, S. G., Alderson, Jeremy and Erle, contra*, were stopped by the Court.

BAYLEY, J.—It is not necessary to give any opinion upon the question, whether the magistrates can vary the line for carriages and retain the old line as a public road for foot passengers. A power is given to reserve a private road, but it does not appear that the magistrates are expressly authorised to reserve a public road for any purpose whatever. It might be objected that the parish would be thereby rendered liable to the repair of two roads instead of one. As to the other point, when the justices are taking away a public right, we ought to be satisfied that something equally permanent is substituted. But if the new turnpike road was made under the local act, it could be made only for twenty-one years. If on the other hand it be said, that it was made by an order under the 3 Geo. 4, c. 126, such order should have been stated in the case.

LITLEDALE, J.—If the road from I. to E. became a turnpike road without having been previously a highway, it would be a highway merely during the continuance of the turnpike act under which it was made, and the public would not derive from the order a benefit equal to that which was taken away. On the face of the order this is left uncertain. The order having left this point doubtful, if when the case came before the Court of Quarter Sessions it had been found as a fact in what manner the line from I. to E. became a public highway, we might have seen whether the division could be legally made a road; but here we are left quite in the dark. Upon the other point we cannot give any judgment as to the validity of the order. There appears to be considerable difficulty in reserving a public

way for any purpose, when a highway is diverted. I never heard of such a reservation. But upon this point I give no opinion. As to the consent, I rather think that it was sufficient. It was part of the agreement, and the price of the agreement. The words "shall and may be sold," in the statute (*a*) appear to me to apply to cases where a sale is necessary.

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PARKE, J.—It is enough to say that this is a case in which the order does not show any jurisdiction properly exercised. The Court will give the magistrates credit for the proper exercise of the discretion vested in them; but we are bound to see that on the face of the order, the public have as good and permanent a right to go from I. to E. as they had from H. to F. Here it is quite uncertain under what authority the road from I. to E. became a highway. It is for the person who would avail himself of the power of the magistrates to show that it was properly exercised.

Order of Sessions quashed (*b*).

(*a*) 3 *Geo. 4*, c. 126, s. 86.

(*b*) The following special case was argued in Trinity Term, 1830:—

ALLNUTT and another *v.* POTT.

THE case stated, that until 12 March, 1829, the close mentioned in the declaration, in which the trespasses were committed, was a common highway and turnpike road for all the king's subjects, leading from Penshurst to Cowden; on the 12 March, 1829, the following order was made by the trustees, acting under the authority of an act of the 9th year of the reign of King George 4, entitled "An Act for making and repairing the road leading from Penshurst to Cowden." "The undersigned

trustees hereby order that so much of the old turnpike road leading from Penshurst town to Cowden, as lies between the points at which the said old turnpike road touches the new line of turnpike road lately formed at or near the foot of Blower's Hill, commencing above Machin's Cottage, and extending to the road or way leading out of the said turnpike road towards farms, respectively called Harden's and Salmon's, and containing in length by admeasurement 66 rods and one half, be the same more or less,

An order for stopping up a road under the general turnpike act, 3 *Geo. 4*, c. 126, where the site of the old road is taken in exchange for that of the new, is valid, although no conveyance to the trustees be executed.

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and situate in the parish of Penshurst aforesaid, shall be stopped up and wholly discontinued to be used as a public highway, the same having in the judgment of the said trustees become useless and unnecessary, and that the said old turnpike road so ordered to be stopped up shall be given up to and become sole and absolute property of Frances Allnutt, of South Park, in Penshurst aforesaid, widow, and Charles Pott, of Bridge Street, Southwark, esquire, as devisees in trust under the will of the late Richard Allnutt, of South Park aforesaid, esquire, deceased, pursuant to the agreement in that behalf with the said devisees, and in exchange for the land given up by them and intended to be forthwith conveyed to the said trustees, and now formed into and constituting the new road as aforesaid, and to be henceforth used as and for a turnpike road, containing in length by admeasurement 66 rods or thereabouts, and also situate in the Penshurst aforesaid, together with the piece of land also given up by the said devisees to the said trustees, and added to the said turnpike road, containing in length 22 rods, and in width (on an average) one half rod or thereabouts, lying higher up on Blower's Hill aforesaid, on the left hand side ascending the hill, and in the said parish of Penshurst." This order was signed by five trustees, one of whom was the chairman duly appointed for that purpose. No previous order had been made by the trustees, nor was there any agreement in writing by the plaintiff to convey to the trustees the soil of the new line of road mentioned in

the order, but the said new line of road had been completed at the expense of the plaintiff before the 12th of March, 1829, and the soil thereof was duly conveyed by the plaintiffs to the trustees on the 22d October, 1829, and on that day the trustees of the road conveyed to the plaintiffs the soil of the said old road. Trespasses were committed by the defendant in the said old road between the 12th March and the 22d of October, 1829, and also between the latter period and the commencement of the action.

*Brodrick*, for the plaintiff. The defendant will rely upon *The King v. Winter*, (*suprà*, 433,) but that case was determined upon the 55 Geo. 3, c. 68, s. 2, and 3 Geo. 4, c. lxxv. But this case turns upon the construction of 3 Geo. 4, c. 126. If the plaintiff can show that the public have acquired a new turnpike road, the plea cannot be supported. The provision of 3 Geo. 4, c. 126, applies to all local acts which were then in force, or which should be afterwards enacted. No form of order is given by any schedule annexed to this act, nor does it appear necessary that any order at all should be made where land is taken in lieu of land. The first sect. of 3 Geo. 4, c. 126, which has any bearing upon this point is the 83d. which authorises trustees of turnpike roads to make, divert, shorten, vary, alter and improve the course or path of any road under their care and management, tendering and making satisfaction to the owners. Section 84 authorises the trustees to treat, contract, and agree with the owners of and persons interested in any

lands and tenements which they shall deem necessary to purchase for the purpose of widening, &c., such road, for the purchase thereof and for the loss or damage such owners or persons may otherwise sustain. And it shall be lawful for all bodies politic, corporate or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whatsoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them; and for and on behalf of their *cetteux que trust*, whether feme covert, infants, &c., and to and for all and every person and persons whatsoever possessed of or interested in any such lands and tenements, or who shall sustain any damage as aforesaid, to contract with the said trustees for the sale thereof, or for the satisfaction to be made, and by conveyance, lease and release, or bargain and sale, to sell and convey unto the said trustees all or any such lands or tenements for the purposes aforesaid. And all contracts, sales, and conveyances so made shall be good, valid and effectual to all intents and purposes without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts and interests whatsoever. Section 85, provides for the ascertainment of the value by a jury where the parties neglect or refuse to treat or do not agree, or are prevented from treating by reason of absence, and directs that the verdict on inquisi-

tion and judgment, order and determine thereon shall be final, binding, and conclusive against all parties and persons claiming any estate in possession, reversion or otherwise, their heirs and successors, as well absent as present, infants, &c., bodies politic, &c., as well as all and every person or persons whatsoever. Section 86, after directing the application of the money assessed, or agreed to be paid, contains the following provision, "and upon such payment to such parties or persons, or their agents, or into the Bank of England, and after 30 days' notice thereof given, &c., then such lands, &c., shall be vested in such trustees, &c., and shall and may be taken and used for the purpose of such act, and such lands, and the site of such lands, &c., shall be laid into and made part of the road in such manner as the said trustees or commissioners shall direct, and shall be repaired and kept in repair by such trustees or commissioners by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all parties and persons whomsoever shall be divested of all right and title to such lands, &c.; and after such new road shall be completed, the lands and grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, or shall or may be stopped up and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land or waste ground, or to some church,

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mill, village, town or place, lands or tenements to which such said new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open either as a public or private way or ways for the use of any inhabitant at large, or any individual or individuals) and shall be vested in, and shall and may be sold and conveyed by the said trustees or commissioners in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the act for repairing and maintaining such turnpike road, and all conveyances being executed by the said trustees or commissioners and enrolled in the office of the clerk of the peace for the county, city or place wherein such road shall be situate shall be good and effectual in the law to all intents and purposes whatsoever; or it shall be lawful for the said trustees or commissioners instead of making such sale as aforesaid, to give up to the owners or proprietors of any adjoining lands, tenements or hereditaments, whose building, land or ground shall be had or taken for the purposes of this act, any part or parts of the present or old roads, in lieu of and in exchange for the same, in such way and manner as such trustees or commissioners and owners or proprietors shall agree upon and think fit. Upon the face of this order it appears, that the new road was to be given in compensation for the old road. This order comes within the last clause of the 86th section. The provisions of section 88 are most important. "That

when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as herein-after mentioned with regard to pieces of ground not wanted; but if such old road shall lead to any lands, house or place, which cannot in the opinion of the said trustees or commissioners be conveniently accommodated with a passage from such new road, which they are hereby authorised to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house or place respectively, according to the ancient usage in that respect; and the money arising from such sale in either of the said cases shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the tolls arising on such road, as the trustees or commissioners thereof shall think fit. And upon the completion of any contract whereby any part of the old road shall be given in payment for the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the

soil of such old road shall become vested in the purchaser thereof and his heirs, but all mines, minerals and fossils lying under the same, shall continue the property of the person or persons who would from time to time have been entitled to the same if such old road had continued. As soon, therefore, as the new road was made and completed in lieu of the old road, and the public had acquired the same rights upon the new road as they had enjoyed upon the old, the property in the old road vested in the plaintiffs. Not a syllable is to be found in this statute requiring a conveyance to the trustees in such a case, though for greater security a conveyance was in fact afterwards executed, and the trespasses were committed even after that conveyance. The form of the order used on this occasion seems to have been taken from *De Beauvoir v. Welch*, (*ante*, i, 81,) in which no objection was taken to the form of the order. Here the order substantially complies with all that the statute requires. The conveyance may be coupled with the order, so as to give a title to the new road. [*Bayley*, J. Is there any clause of appeal?] An appeal is given to the next quarter sessions by the 4th of *Geo. 4*, s. 87. [*Lord Tenterden*, C. J. Parties are not bound to appeal against an order which is bad on the face of it.]

*Barnewall*, contra. If the order was not originally good, the defendant would be justified in using the old road. This order was bad on the face of it. The authority of the trustees depended upon a condition which has not been per-

formed. It is not denied on the other side that the public must have some road. It is said that the 88th section vests the soil in the trustees, but that is only so where the road is properly diverted. The new road must be completed so as to give the public a beneficial use of it. The 84th section, after enumerating persons who, without a special enactment, would be incapable, authorises them to sell and convey, that is, to convey where there is an agreement. Where persons refuse to treat, the ascertainment is to be before a jury, which is made equivalent to a conveyance. The second case is, where the parties do not choose to come in, or refuse their purchase money, after the new road is completed, refers to the road which is previously to be conveyed to trustees, either by actual conveyance or by the verdict of a jury. Upon the face of the order the trustees do not shew how the road is become unnecessary, yet the power to stop up is only given in certain cases. It ought to appear on the face of the order that the old road has become unnecessary. It does not appear that the road was diverted or turned. The section does not, therefore, apply to this case. The trustees possessed a power of stopping up only where the same right is given to the public. It was not the intention of the legislature by that clause alone to transfer the property without an actual conveyance. [*Bayley*, J. May not the public have a right of passage without the soil being conveyed?] It does not appear upon the face of the order that the new road had ever been used. It was perfectly

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competent to the owner of the soil of the new road to revoke the authority and exclude the public. A dedication to the public is not to be presumed. The owner would not be bound, inasmuch as there was no agreement in writing to comply with the statute of frauds.

*Brodick*, in reply. The clause requiring a conveyance does not apply. The case is where the party has a complete title. It would be totally useless in such cases to execute a conveyance. The clause must be governed by the other parts of the statute. It is admitted that no conveyance is necessary where the value is assessed by a jury. The mere conveyance of the soil to the trustees would not give the right of passage.

Lord TENTERDEN, C. J.—The question is whether a new road can be effectually dedicated to the public by a person who is *sui juris*, without an actual conveyance. It is perfectly clear, that if such a party agree with the trustees, and the money is paid, no conveyance is necessary. When parties neglect or refuse to treat, there need be no conveyance. A conveyance is required where parties are under some legal incapacity. And it is reasonable that in such a case a conveyance should be executed, in order that there may be evidence against the *cestui que trust*. When a person *sui juris* sells, I cannot see why this should be necessary when he manifests his consent by permitting the road to be made over his land.

The other judges concurred.

Postea to the plaintiff.

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THOMAS v. W. COOKE.

A promise to indemnify a co-surety need not be in writing.

**ASSUMPSIT.** The declaration contained four special counts, upon an undertaking to indemnify the plaintiff against his liability upon a joint and several bond, by which plaintiff and defendant were jointly and severally bound to one *Morris*, for a debt due from one *T. Cooke*. At the trial at the last Spring assizes for the county of Hereford, before *Park*, J. it appeared that the plaintiff, at the request of the defendant, had entered into the obligation mentioned in the special counts; and to prove that the defendant had entered into an engagement to indemnify, the plaintiff proved, first, a verbal acknowledgment of the defendant's liability; secondly, the joint and several note of the defendant and *T. Cooke* to the plaintiff for the amount. To the acknowledgment it was objected, that this was a pro-

mise for the debt of a third person, requiring an undertaking in writing within the Statute of Frauds; and the note appearing to have been signed by *T. Cooke*, as his separate note, before the defendant's name was added, it was objected that the note was inadmissible, for want of a second stamp. The learned Judge, however, was of opinion against both the objections, and a verdict was found for the plaintiff, damages 300*l.*, the defendant having leave to move to reduce it to 150*l.* In the following Easter term *Russel*, Serjt., obtained a rule for a new trial, on the ground of the reception of improper evidence, or to reduce the damages. The Court, being of opinion that the defendant was clearly liable to a moiety of the debt, by way of contribution(*a*), granted a rule nisi to reduce the damages only. Against which,

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*Taunton* and *Chilton* now shewed cause. The acknowledgment was sufficient, without proving the original promise itself. The learned Judge thought that the note, though not admissible as evidence of a debt, might be looked at to explain the nature of the defendant's undertaking. *The King v. Pendleton* (*b*). [*Bayley*, J. There the Court only looked at the instrument to see whether it applied to the subject-matter. If the note were admissible to shew the nature of the defendant's liability, you might, in every case where you have a note void for want of a stamp,

(*a*) *Vide Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Lord Winchelsea*, *ibid.* 270, and 1 Cox, 318; *Collins v. Prosser*, 1 B. & C. 682; *Philips v. Biggs*, *Hardres*, 164; *Goddard v. Vanderheyden*, 3 Wils. 262; *Young v. Hockley*, *ibid.* 346; *Toussaint v. Martinnant*, 2 T. R. 100, 105; *Cowley v. Dunlop*, 7 T. R. 564, 568; *Child v. Morley*, 8 T. R. 610; *Taylor v. Higgins*, 3 East, 169; *Pothier, Traité du Contrat de Societé*, num.

132; *Rastall*, Ent. 161; *Vet. Intr.* 42; *Bac. Abr. Obligation*, D. 5.

(*b*) 15 East, 449. Where it was held that the justices at session might look at an unstamped agreement relating to an expired hiring and service, for the purpose of ascertaining when it ceased to operate, in order to guide them in receiving or rejecting parol evidence with reference to a subsequent hiring and service. And see *Sutton v. Toomer*, *ante*, i. 125.

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give it in evidence under the money counts. *Littledale, J.* The *other* purpose for which the note was looked at must not be to enforce the debt (a).] The defendant's engagement to

(a) Thus in *Gregory v. Fraser*, 3 Campb. 454, where an alleged loan was impeached on the ground that the defendant had been made drunk by the plaintiff, and, that whilst in a state of intoxication, he had signed an unstamped promissory note without receiving the money, the jury were allowed to see the note as a contemporary writing, to prove or disprove the fraud imputed to the plaintiff. So in *Rhode* and another v. *Proctor* and another, *coram Abbott C. J.* Guildhall, 15 Jan. 1823, MSS. 4 Stark. Ev. 1382, S. C. Anon. It was held that the Stamp Acts do not extend to papers produced for the purpose of shewing that a contract entered into between the parties was merely a cloak for usury. So in *Holland, qui tam*, v. *Duffin*, Peake, N. P. C. 58, to prove the effecting of a lottery insurance, the illegal policy was allowed to be read without a stamp. So in an action for bribery, against a candidate at an election, an unstamped paper, purporting to be a promissory note, given by the voter as a cloak for the bribe, is evidence to shew the fact of the payment of the sum mentioned in the note. *Dover v. Maestaer*, *coram Lord Ellenborough*, C. J. 5 Esp. N. P. C. 93. So upon an indictment for forgery, the instrument is receivable in evidence without a stamp. *Rex v. Morton*, 2 East, P. C. 955; *Rex v. Reculist*, and *Rex v. Davis*, ib. 916; *Rex v. Hawkeswood*, Leach, C. C. 295; *Rex v. Hawkesworth*, 1 T. R. 450.

So an unstamped cheque may be read for the purpose of identifying property on an indictment for larceny. *The King v. Pooley*, 3 B. & P. 316. So an unstamped contract containing directions to an agent, is admissible to prove that such directions were given. *Hedge's case*, 28 Howell's State Trials, 1344. So where a witness swore that a settled draft of a lease was the final agreement of the parties, an unstamped memorandum written afterwards by himself was allowed to be read, as a proposal, for the purpose of proving that the supposed agreement was not final. *Hawkins v. Warre*, 5 D. & R. 512. On the other hand, where the issue was, whether the plaintiff in replevin held at a fixed rent specified in the avowry, unstamped receipts for rent were held inadmissible to support the issue. *Ibid.* So upon an indictment against a clerk for embezzling his master's money, an unstamped receipt given by the clerk to the debtor, who had paid the money, is not even evidence against him. *Per Bayley, J.* Lancaster Summer Assizes, 1821. 4 Stark. Evid. 1382. And upon an indictment for 'setting fire to a house with intent to defraud the insurers, an unstamped policy cannot be received for the purpose of shewing that the insurance was effected. *The King v. Gillson*, 1 Taunt. 95. So, though a conveyance, void for fraud as against third persons, will enure as an act of bankruptcy, *Whitwell v. Thomp-*

indemnify the plaintiff does not fall within the 4th section of the Statute of Frauds. At the time the promise was made the plaintiff was not a creditor, which has always been considered as necessary to bring the case within the statute. It is like the ordinary case of one man becoming bail at the instance of another, who indemnifies him. A verbal indemnity is sufficient.

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*Russell, Serjt., and Curwood, contra.* Here the promise of the defendant, as described in the declaration, is a promise to indemnify the plaintiff if he should be called upon to pay the debt of *T. Cooke* to *Morris*. This, therefore, is distinctly a promise to answer for the debt, default, or miscarriage of another person. *Jones v. Cooper (a)* shews that it is immaterial whether the promisee be or be not a creditor.

BAYLEY, J.—I am of opinion that this case is not within the Statute of Frauds. By the 4th section of that statute it is provided, that “no action shall be brought to charge the defendant, upon any special contract, to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the parties to be charged therewith, or by some other person thereunto by him lawfully authorized.” Here the promise was not made to the creditor. If this promise had been made to the creditor, it would have been an engagement to pay the debt due from *T. Cooke*; but the case here is, that the defendant, having it in contemplation to become surety for *T. Cooke*, says to the plaintiff, “if you will join me in the security I will bear you harmless, in case *T. Cooke* shall not.” This action is founded, not on the debt due to *Morris*, but on the consent to enter into the

son, 1 Esp. N. P. C. 68, it will not all. *Whitworth v. Dimsdale*, Peake,  
so enure if it bear no stamp, as N. P. C. 168.  
then no conveyance is proved at (a) Cowp. 227.

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bond jointly with the defendant. A promise to indemnify does not seem to fall within either the words or the policy of the statute.

LITTLEDALE, J. concurred.

PARKE, J.—I think this is not such a promise as is mentioned in the 4th section of the Statute of Frauds. If the plaintiff had paid money to a third person, at the request of the defendant, a verbal promise of repayment would have been sufficient; and if the plaintiff were to sue for contribution against the defendant as a co-surety, he would be entitled to recover half, without a written undertaking.

Rule discharged (a).

(a) Even where the promise is made to the original creditor, yet if the original debtor be at the same time discharged, so that the new promise enures as an *expromissio*, not as an *adpromissio*, the statute has been held not to apply, *Goodman v. Chase*, 1 B. & C. 297, 308. As to the distinction between an *expromissor* and an *adpromissor*, see Vinn. Inst. Imp. Comm. lib. 2, tit. 1, de rerum divisione, &c. Ibid. lib. 3, tit. 21, de fidejussoribus. Ibid. lib. 4, tit. 9. 659, de constitutâ pecuniâ. And as to the different rights and liabilities of parties, accordingly as the promise or engagement assumes the one form or the other, see F. N. B. 121, marginal note, (d); *Forth*

*v. Stanton*, 1 Saund. 210, 1 Lev. 262, and 2 Keb. 465; *Hooper's* case, 2 Leon. 210, and *Pudsey's* case there cited; *Roe v. Haugh*, 1 Salk. 29; *Buckmyr v. Darnall*, 2 Lord Raym. 1085, 1807; Dict. per Buller, J. in *Tatlock v. Harris*, 3 T. R. 180; *Israel v. Douglas*, 1 H. Bla. 239; *White v. Cuyler*, 1 Esp. N. P. C. 200, and 6 T. R. 176; *Anstey v. Marsden*, 1 N. R. 124, 128, and 2 Smith, 426; *Ayrey v. Davenport*, 2 N. R. 474, 476; *Drake v. Mitchell*, 3 East, 251; *Wilson v. Coupland*, 5 B. & A. 228; *Cuxon v. Chadley*, 5 D. & R. 417, and 3 B. & C. 591; *Spratt v. Hobhouse*, 4 Bingh. 173; *Wharton v. Walker*, 6 D. & R. 288, and 4 B. & C. 163.

# DOCUMENTS

RELATING TO

## THE DUCHY OF CORNWALL.

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### APPENDIX, A.

SKELTON v. STARKE and another. B. R. T. 15 Eliz. (1572).

*Proceedings upon a Writ of Error returnable in the King's Bench, upon a Judgment of the Steward (a) in the Customary Court of the Assessionable Manor of Trematon, upon a Special Verdict as to the Right of a Widow seised as of Freehold for the Term of her Life, from Seven Years to Seven Years, to surrender in fee to any other than the right Heir (b). [Vide ante, 140.]*

THE Lady the Queen has sent to Her right dear cousin and counsellor, Francis Earl of Bedford, Her chief steward of Her Duchy of Cornwall, and of Her Courts of the Stannaries in the counties of Devon and Cornwall, also of Her fee and manor of Trematon, in the said county, or his deputy or lieutenant there, Her writ close in these words:—"Elizabeth, &c. To Our right dear cousin and counsellor Francis Earl of Bedford, Our chief steward of Our Duchy of Cornwall, and of Our Courts of the Stannaries in the counties of Devon and Cornwall, also of Our fee and manor of Trematon, in the said county of Cornwall, or his deputy or lieutenant there, greeting: Because in the record and process, and also in the rendering of judgment upon the plaint which was in Our court of the aforesaid manor without Our writ, according to the custom of the said manor, between Walter Skelton, and John Starke and Nicholas Axford, of the cattle of the same Walter taken and unjustly detained, as it is said, manifest error has intervened, to the great damage of the same Walter, as from his complaint We have heard: We willing that the error (if any there be) be corrected in due manner, and that full and speedy justice be done to the said parties in this behalf, do command you, that if judgment have been rendered thereupon, then you send to Us openly and distinctly the record and process of the said plaint, with all things touching the same, under your seal, and this writ, so that We may have them from the day of Easter in one month, wheresoever We shall then be in England, that, having inspected the record and process aforesaid, We may thereupon cause to be done for correcting that error what of right and according to the law and custom of Our kingdom of England ought to be done. Witness Myself, at Westminster, the 11th day of March, in the 15th year of Our reign."

The record and process, of which mention is made in the above writ, follow in these words:

(a) In the Court Baron, or Freeholders' Court, the suitors are the judges; in the Customary Court, held for the tenants of base tenure, the steward.

(b) The record from which the above is translated, is to be found in Coke's Entries, p. 293. Being entered there under the title "ERROR," this remarkable document appears to have escaped notice; at least it was not referred to by either party at the trial at bar.

MANOR OF TREMATON.—Court of the Lady the Queen there holden before Edward Hastings, knight of the most noble order of the garter, Lord Hastings of Loughborough, chief steward of the Lady the Queen of Her Duchy of Cornwall, on the last day of July, in the 13th year of the reign of the Lady *Elizabeth*, now Queen of England, according to the custom of the same court, from time to the contrary whereof the memory of man doth not exist, there used and approved, &c. To this court comes Walter Skelton in his own person, and complains against John Starke and Nicholas Axford in a plea of taking and unjustly detaining his cattle, and then and there he found pledges of prosecuting his said suit and of returning the said cattle, if a return should then be adjudged, to wit, John Doe and Richard Roe, and prayed that process should thereupon be granted to him according to the custom of the said court: And upon this, according to the custom of the same court, it was ordered to the reeve and decenner of the said court that he should deliver the said cattle to the said Walter Skelton, and that he should put by gages and safe pledges the aforesaid John Starke and Nicholas Axford to be at the aforesaid court of the Lady the Queen, before the aforesaid steward there, on the 20th day of August then next following to be held, to answer the aforesaid Walter Skelton of a plea of taking and unjustly detaining the said cattle. The same day is given to the aforesaid Walter Skelton, there, &c. At which court of the Lady the Queen, before the aforesaid steward, comes the said Walter Skelton in his own person, and the said reeve and decenner of the said court returned that they have caused the said cattle to be delivered to the said Walter Skelton, and that the said John Starke and Nicholas Axford were attached by two cows, of the price of 40*s.* each, to be at the next court of the said manor, as was commanded them: And the said John Starke and Nicholas Axford then and there appeared by William French, their attorney: Whereupon the said Walter Skelton, according to the custom of the said manor, declared against the said John Starke and Nicholas Axford in a plea of taking and unjustly detaining his cattle: And thereupon the said Walter Skelton in his own person says, that the said John Starke and Nicholas Axford, on the 24th day of July, in the 13th year of the reign of our Lady Elizabeth, by the grace of God of England, France and Ireland Queen, broke and entered the close of the said Walter at Brodmore, within the jurisdiction of this court, and took 21 ewe sheep of the goods and chattels of the said plaintiff then depasturing, and drove them as far as the castle of Trematon, and there impounded them and detained them in the pound against gages and pledges, until, &c., to the damage of the said plaintiff of 30*s.*: And thereof he brings suit, &c.

And the said John Starke and Nicholas Axford, by their attorney aforesaid, come and defend the force and wrong, when, &c., and all taking and whatsoever, &c., and saving to themselves all and all manner of advantages, pray a day to imparl thereupon: And it is granted to them, &c.: And hereupon a day is given to the said parties before the said steward, until the next court of the said Lady the Queen, before the said steward there, on the 11th day of September thence next following, to be holden; to

wit, to the said John Starke and Nicholas Axford to imparl and then to answer (ad replicandum), &c.

Trematon, to wit.—The court of the Lady the Queen there holden before the aforesaid steward on the 11th day of September, in the 13th year of the reign of *Elizabeth*, by the grace of God, &c., according to the custom of the same court, from time whereof the memory of man is not to the contrary, there used and approved, &c.: At which next court of the said Lady the Queen, holden before the aforesaid steward on the 11th day of September, in the above-mentioned year, come as well the said Walter Skelton in his own person, as the said John Starke and Nicholas Axford by their said attorney, and the said John and Nicholas defend the force and wrong, when, &c., and all taking and whatsoever, &c.: And the said John Starke well avows, and the said Nicholas Axford as bailiff, and by the command of Agnes Roberts, widow, well acknowledges the taking of the said sheep in the said close in which, &c., and justly, &c., because they say that the said John Starke and Agnes Roberts are, and at the time at which the said sheep are supposed to have been taken, were seised of and in one messuage and 30 acres of land, with their appurtenances, in Brodmore aforesaid, of which the said close in which, &c., at the time when, &c., was parcel in their DEMESNE AS OF FEE, TO WIT, FROM SEVEN YEARS TO SEVEN YEARS, ACCORDING TO THE CUSTOM OF THE SAME MANOR OF TREMATON AFORESAID: And because the said 21 sheep, at the time when, &c., were in the said close in which, &c., the grass in the said close then growing, depasturing and treading down, and then and there doing damage in the said close, the said John Starke as in his own right, and the said Nicholas Axford as bailiff of the said Agnes, at the same time, when, &c., took the same 21 sheep in the said close in which, &c., trampling down the grass then and there growing, and doing damage in the said close, and drove and led them thence unto the castle aforesaid, and in the same castle impounded them, as was lawful for them. And this they are ready to verify; wherefore they pray judgment, and a return of the said sheep to be adjudged to them the said John Starke and Agnes Roberts. And the said Walter Skelton in his own person comes and prays a day to imparl thereupon, and it is granted to him: And upon this a day is given to the aforesaid parties before the said steward, at the next court of the said Lady the Queen, to be holden before the said steward on the 23d day of October then next following, to wit, to the said Walter Skelton to imparl and then to answer (ad replicandum), &c. At which court of the said Lady the Queen there holden, come as well the said Walter Skelton in his own person as the said John Starke and Nicholas Axford by their said attorney; and hereupon the said Walter Skelton, by William Parkyns, his attorney, comes and says, that neither the said John Starke, by means of any thing above alleged, nor the said Nicholas Axford, as bailiff of the same Agnes, ought, nor ought either of them, justly to avow or justify the taking of the said cattle in the said close in which, &c., because protesting that the said John Starke and Agnes Roberts never were seised of the said messuage and



30 acres of land, with the appurtenances, in Brodmore, in their demesne, as of fee, according to the custom of the said manor, as is contained in the aforesaid avowry, for a plea, says, that long before the said John Starke and Agnes Roberts had any thing in the said tenements, one John Hawdy, the son of John Hawdy and Millizent his wife, was seised thereof in his demesne as of fee from seven years to seven years, according to the custom of the said manor: And being so seised at a special court of the said manor, holden at Rockeborough on the 30th day of October, in the 3d year of the reign of the Lady the now Queen, the same John Hawdy surrendered the aforesaid tenements into the hands of the said Lady the Queen with this intention and under this condition, that the said Walter Skelton might have them: Whereupon the said Walter Skelton at the same court took from the said Lady the Queen the aforesaid messuages and other premises, with the appurtenances, to have to himself, his heirs and assigns, according to the custom of the aforesaid manor, and did fealty to the same Lady the Queen, and thus was admitted tenant according to the custom of the aforesaid manor; by virtue of which the same Walter Skelton was and still is seised thereof in his demesne as of fee (a), according to the custom of the aforesaid manor; and this he is ready to verify: Wherefore he prays judgment and his damages on occasion of the taking and unjustly detaining his aforesaid cattle to be adjudged to him: And hereupon the said John Starke and Nicholas Axford, by their aforesaid attorney, pray a day to imparl thereupon, and it is granted to them: And hereupon a day is given to the aforesaid parties before the said steward, at the next court of the said Lady the Queen there, on the 13th day of November then next following, to be holden, to wit, to the said John Starke and Nicholas Axford to imparl, and then to rejoin (b): At which next court of the said Lady the Queen, holden before the aforesaid steward on the said 13th day of November then next following, come, as well the said Walter Skelton in his own person, as the said John Starke and Nicholas Axford by their aforesaid attorney, and the aforesaid John Starke and Nicholas Axford say, that neither he the same John Starke nor the said Nicholas Axford ought to be precluded, by any thing by the said Walter Skelton before alleged, from avowing and acknowledging the taking of the said cattle in the said place in which, &c., and that justly, &c., because they say that long before the said John Hawdy, the son of the aforesaid John Hawdy and Millizent, had any thing in the premises, the same John Hawdy, the husband of the said Millizent, was seised of the premises in his demesne as of fee, to wit, from seven years to seven years, according to the custom of the aforesaid manor; and being so seised, married another wife long before the said Millizent, by which first wife he had issue one John, his first begotten (son); and afterwards his said first wife died, after whose death the said John Hawdy took to

(a) Here the seisin in fee of the surrenderee is stated without any qualification except the reference to the custom of the manor, although it appears by the preceding words, that the surrenderor held from seven years to seven years.

(b) This appears to be incorrect, Starke and Axford being the defendants, avowing and making cognizance, and having to reply to the plea in bar.

wife the said Millizent, which John and Millizent had issue John, in the plea of the said Walter Skelton by him pleaded by way of reply (a), and died seised of the premises; after the death of which John Hawdy the father, the aforesaid Millizent entered into the premises, and was seised thereof in her demesne as of freehold (b), to wit, for the term of her life, according to the custom of the said manor (c), and she died seised of such estate; after whose death the messuages and 30 acres, with the appurtenances, in Brodmore aforesaid, descended, as of right they ought to descend, to the said John Starke and Agnes Roberts as cousin and heir of the said first begotten John Hawdy; that is to say, to the said John Starke as the son of one Joan, one daughter of Roger, the uncle of the said first begotten John Hawdy; and to the said Agnes Roberts as another daughter of the said Roger, the uncle of the said first begotten John Hawdy; whereby the same John Starke and Agnes entered upon the close of the aforesaid land, and entered upon the said tenements, and were seised thereof in their demesne as of fee, according, &c.: And because they being thus seised thereof, the said sheep, at the time when, &c., were in the said close in which, &c., and depasturing the grass growing in the same, the same John Starke in his own right, and the said Nicholas Axford as bailiff of the said Agnes Roberts, took the said 21 sheep, being found in the said close in which, &c., and depasturing and treading down the grass aforesaid then and there growing, and at the same time doing damage in the said close, and drove and led them thence to the castle aforesaid, and there impounded them in the said castle, as was lawful for them, and this justly, &c.: Without this that the said John Hawdy, the son of the same John and Millizent his wife, in the plea of the same Walter Skelton, by way of reply (a), named, ever was seised of the aforesaid messuages and 30 acres of land in Brodmore, in his demesne as of fee, according to the custom of the said manor, to wit, from seven years to seven years, in manner and form as the said Walter in his said replication has alleged, and of this he puts himself upon the country, &c.: And hereupon the same Walter Skelton prays a day to imparl thereupon, and it is granted to him, &c.: And hereupon a day is given to the aforesaid parties before the aforesaid steward, until the next court of the said Lady the Queen there, on the 4th day of December, in the 14th year of the reign of the said Lady the Queen, thence next following, to be holden, to wit, to the said Walter Skelton to imparl, and then to rejoin (a), &c.: At which same next court, holden before the said steward on the 4th day of December thence next following, comes as well the said Walter Skelton in his own person, as the said John Starke and Nicholas Axford by their said attorney: Whereupon the said Walter Skelton says, that neither the same John Starke nor the afore-

(a) This appears to be incorrect, vide supra 4, (b).

(b) Here the widow's interest in the customary estate from seven years to seven years, is described in the same terms which are used with reference to a freehold in point of tenure.

(c) The widow took the whole by the custom in the nature of free bench. *Vide ante*.

30 acres of land, with the appurtenances, in Brodmore, in their demesne, as of fee, according to the custom of the said manor, as is contained in the aforesaid avowry, for a plea, says, that long before the said John Starke and Agnes Roberts had any thing in the said tenements, one John Hawdy, the son of John Hawdy and Millizent his wife, was seised thereof in his demesne as of fee from seven years to seven years, according to the custom of the said manor: And being so seised at a special court of the said manor, holden at Rockeborough on the 30th day of October, in the 3d year of the reign of the Lady the now Queen, the same John Hawdy surrendered the aforesaid tenements into the hands of the said Lady the Queen with this intention and under this condition, that the said Walter Skelton might have them: Whereupon the said Walter Skelton at the same court took from the said Lady the Queen the aforesaid messuages and other premises, with the appurtenances, to have to himself, his heirs and assigns, according to the custom of the aforesaid manor, and did fealty to the same Lady the Queen, and thus was admitted tenant according to the custom of the aforesaid manor; by virtue of which the same Walter Skelton was and still is seised thereof in his demesne as of fee (a), according to the custom of the aforesaid manor; and this he is ready to verify: Wherefore he prays judgment and his damages on occasion of the taking and unjustly detaining his aforesaid cattle to be adjudged to him: And hereupon the said John Starke and Nicholas Axford, by their aforesaid attorney, pray a day to imparl thereupon, and it is granted to them: And hereupon a day is given to the aforesaid parties before the said steward, at the next court of the said Lady the Queen there, on the 13th day of November then next following, to be holden, to wit, to the said John Starke and Nicholas Axford to imparl, and then to rejoin (b): At which next court of the said Lady the Queen, holden before the aforesaid steward on the said 13th day of November then next following, come, as well the said Walter Skelton in his own person, as the said John Starke and Nicholas Axford by their aforesaid attorney, and the aforesaid John Starke and Nicholas Axford say, that neither he the same John Starke nor the said Nicholas Axford ought to be precluded, by any thing by the said Walter Skelton before alleged, from avowing and acknowledging the taking of the said cattle in the said place in which, &c., and that justly, &c., because they say that long before the said John Hawdy, the son of the aforesaid John Hawdy and Millizent, had any thing in the premises, the same John Hawdy, the husband of the said Millizent, was seised of the premises in his demesne as of fee, to wit, from seven years to seven years, according to the custom of the aforesaid manor; and being so seised, married another wife long before the said Millizent, by which first wife he had issue one John, his first begotten (son); and afterwards his said first wife died, after whose death the said John Hawdy took to

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(b) Here the widow's interest in the customary estate from seven years to seven years, is described in the same terms which are used with reference to a freehold in point of tenure.

(c) The widow took the whole by the custom in the nature of free bench. *Vide ante*.

said Nicholas Axford ought to maintain the taking of the aforesaid cattle in the aforesaid place, in which, &c., to be just, because he says for plea, that at a special court of the aforesaid manor there, held on the 1st day of October, in the year of the reign of the late King Edw. the 6th, the same Millizent, formerly the wife of John Hawdy, then in her sole widowhood, took of the aforesaid Lord the King, the tenure called Brodmore, whereof the place in which &c. is parcel: By virtue whereof the same Millizent afterwards, to wit, at a *special Court (a)* of the aforesaid manor there, held at Rockborough, within the aforesaid manor, on the 30th day of October, in the 3rd year of the reign of our Lady Elizabeth by the grace of God now Queen, surrendered the aforesaid *tenure* with the appurtenances into the hands of our Lady the Queen, to the use and behoof of John Hawdy her son and heir apparent: By virtue whereof, the aforesaid John Hawdy was thereof seised in his demesne as of fee, according to the custom of the aforesaid manor *(b)*: Of which John Hawdy the same Walter has the estate of and in the premises, in manner and form as he above pleaded in his replication *(c)*: And this he is ready to verify: Wherefore he prays judgment, and his damages occasioned by the taking and unjust detention of his aforesaid cattle to be adjudged to him, &c.: And hereupon the said John Starke and Nicholas Axford, by their aforesaid attorney, pray a day to imparl thereon, and it is granted to them; and thereupon a day is thereof given to the parties aforesaid, before the aforesaid steward at the next court of our Lady the Queen there, on the 25th day of December thence next following, to be holden, to wit, to the said John Starke and Nicholas Axford to imparl, and then, &c.: At which next Court of our said Lady the Queen, before the aforesaid steward, on the said 25th day of December thence next following holden, come as well the aforesaid Walter Skelton in his own person, as the aforesaid John Starke and Nicholas Axford by their aforesaid attorney: And the aforesaid John Starke and Nicholas Axford protesting that the plea of the aforesaid Walter Skelton in manner aforesaid, pleaded by way of surrejoinder *(d)*, is insufficient in law, and saving to themselves thereupon in future all sorts of benefit, the aforesaid John Starke and Nicholas Axford for plea say as before, that long before the aforesaid first day of October, in the above mentioned 3rd year of the reign of the late King Edw. 6th, the aforesaid John Hawdy, lately husband of the aforesaid Millizent, was seised of the aforesaid tenure called Brodmore, whereof &c., in his demesne as of fee, to wit, from seven years to seven years, according to the custom of the aforesaid manor: And being so seised, he died thereof seised: After whose death, the aforesaid Millizent entered into the aforesaid tenure, whereof, &c., and was seised in her demesne as of freehold, for the term of her life, to wit, from seven years to seven years, according to the custom of the manor aforesaid: And she, being thus seised as of freehold, for the term of her life,

(a) As to these special courts, *vide ante*, 287.

(b) *Vide supra*, 452 (a).

(c) Rather, his plea in bar to the avowry.

(d) Rather, by way of rejoinder.

from seven years to seven years (a), according to the custom of the manor aforesaid, on the first day of October, in the before mentioned 3rd year of the reign of the late King Edw. the 6th, took from the said late king the aforesaid tenure, whereof, &c., in manner and form aforesaid, and was thereof seised for the term of her life only, to wit, from seven years to seven years (a), according to the custom of the manor aforesaid: And being thus seised thereof, she, the same Millizent, on the aforesaid 30th day of October, in the before mentioned 3rd year of the said now Queen, surrendered the aforesaid tenure, whereof, &c., in manner and form aforesaid, which surrender was contrary to the custom of the manor aforesaid: Without this, that the aforesaid Millizent, at the time of the aforesaid surrender, was seised of the aforesaid tenure, whereof, &c., in her demesne as of fee, to wit, from seven years to seven years, according to the custom of the manor aforesaid, in manner and form as the aforesaid Walter above in his surrejoinder (b) alleged; and this they are ready to verify: Wherefore they pray judgment, and a return of their aforesaid sheep, together with damages to be adjudged to them the aforesaid John Starke and Agnes Roberts: And hereupon the aforesaid Walter Skelton prays a day to imparl thereon, and it is granted to them: And hereupon a day is given thereupon to the parties aforesaid, before the aforesaid steward, until the next Court of the aforesaid Lady the Queen there, on the 16th day of January then next following, to be holden, to wit, to the aforesaid Walter to imparl, and then to answer, &c.: At which next Court of our said Lady the Queen, holden before the aforesaid steward, on the said 16th day of January (c) thence next following, come as well the aforesaid Walter Skelton in his own person, as the aforesaid John Starke and Nicholas Axford by their aforesaid attorney: On which day, the aforesaid Walter Skelton, protesting that the aforesaid plea of the said John Starke and Nicholas Axford is insufficient in law, for plea, as before, says, that the surrender of the aforesaid TERM (d) by the aforesaid Millizent, above pleaded in the plea of the aforesaid Walter Skelton, was just, according to the custom of the manor aforesaid: And thereupon the aforesaid Walter in fact says, that the same Millizent, at the time of the aforesaid surrender, was seised of the aforesaid tenure with the appurtenances in her demesne as of fee, to wit, from seven years to seven years, of such an estate, that she then might surrender the same by the custom of the manor: And this he prays may be inquired of by the country: And the aforesaid John Starke and Nicholas Axford do the like, &c.: Therefore it is commanded to the reeve and debenner of the Court aforesaid, that they cause to come before the aforesaid steward at the next Court of our said Lady the Queen there, on the 6th day of February, thence next following, to be held 12, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. The same day is given to the aforesaid parties there, &c.

(a) Here the qualification is introduced into the widow's quasi freehold.

(b) Rejoinder.

(c) "February," in Lord Coke.

(d) So in Coke; but query whether this important word is to be found on the roll, as it does not appear in any other part of the pleadings.

At which next Court of our said Lady the Queen, holden before the said steward on the said sixth day of February, come as well the aforesaid Walter Skelton in his own person, as the aforesaid John Starke and Nicholas Axford by their aforesaid attorney, and by the aforesaid reeve and decenner were returned to the aforesaid Court the names of 12, and the aforesaid writ in all things served and executed, and then and there it was commanded to the said reeve and decenner of the Court aforesaid, that they should have the bodies of the aforesaid jurors before the aforesaid steward at the next Court of the said Lady the Queen, there to be holden on the 27th day of February thence next following, to make the jury aforesaid, between the parties aforesaid, of the plea aforesaid: The same day was given then to the said parties, &c.: At which next Court of our said Lady the Queen, there holden before the aforesaid steward, come as well the aforesaid Walter in proper person, as the aforesaid John Starke and Nicholas Axford by their aforesaid attorney, and the said reeve and decenner of the Court aforesaid returned the writ aforesaid, in all things served and executed; and the jurors of the jury aforesaid being demanded, likewise come, and upon their oath say, That the aforesaid Millizent Hawdy, widow, at the time of the aforesaid surrender, to wit, on the 30th day of October, in the 3rd year of the reign of our Lady *Elizabeth*, was seised of the aforesaid tenure called Brodmore with the appurtenances as of freehold, to wit, for the term of her life, to wit, from seven years to seven years, according to the custom of the manor aforesaid, of such an estate that she could not then surrender by the custom of the manor aforesaid except to the right heir only; And they tax the damages for the plaintiff or for the defendants, to whomsoever the law will adjudge it, at eight-pence, and for their costs and charges at two shillings: Whereupon as well the aforesaid plaintiffs as the aforesaid defendant pray judgment, and because the aforesaid steward of the aforesaid Court will advise himself, day is thereon given to the parties aforesaid, until the Court of our Lady the Queen to be holden on the 10th day of March thence next following: At which day, to wit, on the 10th day of March, in the 15th year of our present Lady Queen Elizabeth, came as well the aforesaid John Starke and Nicholas Axford by their aforesaid attorney, as the aforesaid Walter Skelton in his own person: And the aforesaid Walter Skelton brought (protulit) the following exceptions in delay (in retardatione) of judgment, that is to say (a), *The avowants in their replication have tendered an issue, absque hoc, which ought to have been tried without new matter of pleading, whereby a second issue offred, and taken by the avowant is most apparant error, and therefore no judgement ought to be given. Item, The trial was not in force iudicially within the castle, and therefore in another place, coram non iudice, and therefore mearely royd. Item, There is discontinuance of the proces and causes by many tenants. Item, There is error in the verdict, for they should have said Millizent was seised for life, and not in fee according to the custom. Item, The issue is farder, that she was seised of such an*

(a) The exceptions, which are printed in italics, are in English.

estate that she might surrender, and the jury have found that she might surrender to somebody, which sufficiently proveth the issue, and sendeth (a) for the plaintiff, whereby if any judgement in this case were to be given, it is for the plaintiff. Item, The avowants in their replication have alleged that John Hawdy the father had issue John Hawdy by his first wife, and after his first wife died: And the said John Hawdy tooke to wife, Millizent, &c. Now whether John Hawdy the father or John Hawdy the son married Millizent, is not in the plee shewed, and therefore the law intendeth the same to be John the sonne, for that the plee shall be taken strongest against the pleader of the same. And so for want of certainty manifest error. Item, The whole verdict quite varieth from the issue, and is also per contrā like a Welchman's hose merely contrary in itself, and, therefore, error which is apparant contrary. Item, The verdict is found with two negatives, which is an affirmative, and, therefore, she may surrender to any person from the right heir, and so the verdict for the plaintiff; for the words be these, *de tali statu quod eadem non poterit sursumreddere per consuetudinem manerii prædicti nisi ad rectum hæredem*, so as non and nisi be two negatives, which affirm she may surrender to a stranger, wherfore if any judgement be given against the plaintiff manifest error, for that the verdict is found for him, which is matter of record, &c. Exception on behalf of Starke and Axford against Skelton. The issue in the principal point is found for the defendants, and therupon judgement may be given so upon the verdict. This verdict doth fine that the surrender according to the issue joined is not good, and, therefore, judgement is to be given according: (b) And hereupon the premises being seen, and by the Court here fully understood, it is considered that the aforesaid John Starke and Nicholas Axford do recover against the aforesaid Walter Skelton, their damages of eight-pence, beyond their costs and charges two shillings, and for costs and charges to 6l. to the same John Starke and Nicholas Axford, by the Court here adjudged, which in the whole amounts to 6l. 0s. 8d.; and the aforesaid Walter Skelton in mercy, &c. Whereupon the aforesaid John Starke and Nicholas Axford prayed execution to be made thereon: And because the aforesaid steward of the aforesaid Court will advise himself, day was given to the aforesaid parties until the next Court there to be held, to wit, on the 10th day of April, at which next Court, as well the aforesaid John Starke and Nicholas Axford, as the aforesaid Walter Skelton by their aforesaid attorneys appeared (c): And the aforesaid Walter Skelton brought to me a writ of our Lady the Queen, of error, here annexed to the record, &c.

Afterwards, to wit, on Wednesday next after 15 days of the Holy Trinity, in this same term, before our Lady the Queen at Westminster, come the aforesaid Walter Skelton by Thomas Webb his attorney, and immediately says, that in the record and process aforesaid, and in the rendering of the judgment aforesaid, it is manifestly erred: First, in this, that the aforesaid Walter Skelton brought and made his aforesaid

(a) Query, "soundeth."

(b) The passages in italics are in English.

(c) "Appeciar."



plaint against the aforesaid John Starke and Nicholas Axford of a plea of the taking and unjust detention of his cattle only, and afterwards in declaring upon that plaint, he complained as well for the breaking of the close of the aforesaid Walter as also for the taking and detention of the aforesaid cattle; in this, to wit, that the aforesaid plaint does not maintain the count aforesaid as to the breaking of the close aforesaid. It is also erred in this, that whereas the aforesaid John Starke and Nicholas Axford, in their aforesaid rejoinder, made the aforesaid title to John Starke and Agnes Roberts to the tenements aforesaid with the appurtenances, and concluded with a certain traverse, to wit, by pleading *absque hoc*, that the aforesaid John Hawdy, the son of the aforesaid John Hawdy and Millizent his wife, was ever seised of the aforesaid messuage and thirty acres of land in Brodmore, in his demesne, as of fee, yet Walter Skelton in no manner answered to that traverse, nor joined issue thereon, as by law he ought: And so in the record aforesaid, the said matter and the said issue aforesaid so offered, there is manifest departure, as above appears of record. It is also manifestly erred in this, that it does not appear in any part of the aforesaid record that the twelve persons by whom the aforesaid verdict was given, were ever elected, tried and sworn, to try the issue aforesaid, as in fact they ought to have been tried and sworn, nor by the same record does it any how appear who were the jurors of the jury aforesaid. Moreover, in the record and process aforesaid it is erred in this, to wit, that whereas the issue aforesaid between the aforesaid parties was joined, whether the aforesaid Millizent, at the time of the making of the aforesaid surrender, was seised of the aforesaid tenure with the appurtenances in her demesne as of fee, of such an estate that she could surrender by the custom of the aforesaid manor: And the jury aforesaid rendered their verdict in the following form, to wit, that the aforesaid Millizent Hawdy, at the time of the aforesaid surrender, was seised of the aforesaid tenure with the appurtenances as of freehold, to wit, for the term of her life, of such an estate that she could not then surrender according to the custom of the manor aforesaid, unless only to the right heir: And so because the jurors aforesaid have not found the matter aforesaid, pleaded to issue by the aforesaid parties, but matter concerning which they were not even charged to inquire, it is erred, as above appears of record: And the same Walter prays a writ of our Lady the Queen, to warn the aforesaid John Starke and Nicholas Axford to be before the Lady the Queen to hear the record and process aforesaid, and it is granted to him, &c.: Wherefore it is commanded to the sheriff that by good, &c., he cause the aforesaid John Starke and Nicholas Axford to know that they be before the Lady the Queen on the morrow of All Souls, wheresoever, &c., to hear the record and process aforesaid if, &c.: And further, &c., the same day is given to the aforesaid Walter Skelton, &c.: At which day before our Lady the Queen at Westminster comes the aforesaid Walter Skelton by his aforesaid attorney, and the sheriff returned that by virtue of the writ of the Lady the Queen, to him thereof directed, he caused the aforesaid John Starke and Nicholas Axford to know

that they be before the Lady the Queen as it was commanded to them, to hear the record and process aforesaid, &c., by Nicholas Hillier and John Cardew, good, &c., which John and Nicholas, although thus warned, and having been on the fourth day of the plea solemnly required, did not come: Whereupon the aforesaid Walter Skelton, as before, says, that in the record and process aforesaid, as also in the rendering of the judgment aforesaid, it is manifestly erred, by alleging the errors aforesaid by him above in form aforesaid alleged: And he prays that the judgment aforesaid, on account of those errors and others in the record and process existing, may be revoked, annulled, and altogether held for nothing, and that he may be restored to all things which he lost of our Lady the Queen is not yet advised here of its judgment to be by occasion of the aforesaid judgment: And because the Court rendered of and upon the premises, day is given to the aforesaid Walter in his present state before the Lady the Queen on the Octave of St. Hilary, wherever, &c., for hearing their judgment of and upon the premises, because the Court of the Lady the Queen hereof not yet, &c.: At which day, before the Lady the Queen at Westminster, comes the aforesaid Walter Skelton by his attorney aforesaid: Whereupon as well the record and process aforesaid, as the errors aforesaid above assigned, being seen, and by the Court of the Lady the Queen being fully understood, it is considered that the judgment aforesaid, on account of those errors and others existing in the record and process aforesaid, be revoked, annulled, and altogether held for nothing: And that the aforesaid Walter be restored to all things that he lost by occasion of the judgment aforesaid, &c. Trin. 15 Eliz. regin Rot. 78, in Banco Regis.

## APPENDIX, B.

*Richard, Earl of Poitou and Cornwall, King of the Romans.*

[*Vide Ante*, 140.]

THIS prince, born in 1209, was the second son of King John, by his third wife, Isabella of Angoulême. Henry III., his brother, committed the earldom of Cornwall to him in 1225, and created him Earl of Cornwall in 1231. In the 20 Hen. 3, the Manor and Castle of Lidford with the Forest of Dertemore were granted to Richard, Earl of Poitou and Cornwall (a). In the following year (1240) Earl Richard married the Queen's sister, Sancha of Provence, whom he endowed ad ostium ecclesiæ (b). On this occasion he obtained many royal grants (c), in special tail, viz. to him and his heirs born of the body of his wife Sancha (d). On the 13th Jan. 1257, he was elected King of the Romans, at Frankfort, and on 17th May following, he was crowned at Aix la Chapelle (d). The latter writer thus describes the mode in which Richard set

(a) Abbr. Rot. Orig. 2.

(b) Vide Cal. Rot. Pat. 20, b.

(c) Ante, 334, n. He afterwards purchased lands with the same habendum. — Post, Appendix C.

(d) Gebauer, Leben Richards, erstes Buch §. LIV. 95, 96, &c. — Schmidt, Geschichte der Deutschen, dritter Theil 73, 74, 75, 77. Cal. Rot. Pat. 37.

about subsidizing the German princes with the produce of his Cornish mines. "Ein zwar neuerer deutscher Geschichtschreiber, der aber gleichzeitige Nachrichten vor sich mag gehabt haben, (Hermannus Corner. apud Eccard. Corp. Histor. medii ævi, T. 2, col. 902,) sagt dass er 28 Fässer (Tunnas) voll Gold und Sterlingen (a) mit sich gebracht; andere melden, sagt der nehmliche, er habe 32 Wagen, jeden mit 8 Pferden bespannt bey sich gehabt, auf deren jeden ein drey Ohmen haltendes Fass mit Sterlingen (a), angefüllt gelegen—Dieses mag wohl etwas übertrieben seyn; allein so viel is richtig, dass Richard sehr reich wahr, und grosse Summen mit nach Deutschland gebracht hat. Nebst dem dass er ein sehr guter Wirthschafter war, hatte er die ergiebigen Zinngruben in Cornwallis, die damals die einzigen bekannten in der Welt waren, im Besitz." Schmidt, Geschichte der Deutschen, dritter Theil, 76, 77. Richard when driven out of Germany, returned to England. Being taken at the battle of Lewes, and imprisoned for more than a year, he had aid of his tenants (b). He died in 1271 (c). He was succeeded in the earldom of Cornwall by his second son Edmund, his eldest son Henry (d) having been killed at the siege of Viterbo in the preceding year.

## APPENDIX, C.

*Abstract of "The Coram Rege Roll," being the proceedings in a Petition of Right, in the nature of a formedon in the reverter, against the King; in the course of which, the Inquisitio post mortem comitis Edmundi (e) was certified and transcribed.*

Pleas before the King at Westminster, in Easter Term, in the ninth year of the reign of King Edward, the son of King Edward. W. INGE.

The Petition of Peter Corbet and Henry, son of Henry (f) de

(a) The *sterlings* here spoken of were a silver coin, which appear to have formed the principal circulating medium in the north of Europe. They afterwards became the standard of value in this country, not, however, by tale, but by weight. The denomination of "pound of sterlings" was soon shortened to "pound sterling" though the Latin appellation of "*libra esterlingorum*" was continued to a much later period.

(b) Cal. Rot. Pat. 39, b. That Richard was not much more popular in his own country than he found himself to be in Germany after his treasures were exhausted, may be inferred from the ballad preserved by Bishop Percy in his "*Reliques*," vol. ii. p. 1.

(c) Cal. Rot. Pat. 44, a. b.

(d) *Ante*, 141. See this inquisition at length, *post*.

(e) In Testa de Nevill, 204 is an extent of the lands and tenements of the Lord Henry de la Pomeray in Tregoney, taken at Tregoney on Sunday next before the feast of St. Gregory, 21 Edward I. This document enumerates about 60 freeholders holding of the Manor of Tregoney by knight's service, all whose lands are described in the following form:—

"Osbertus le Sor tenet 2 acras Cornubienses, continentes 2 carucatas Cornubienses, in Treverres et Penhard, et reddit iiii. xd. ad purificationem, et facit sectam," the number of acres Cornish being in each instance expressed to contain the same number of carucates Cornish, *vide ante*, 151, (d).

la Pomeray, cousins and heirs of Roger de Valletorta, presented in the parliament of the Lord the King, at Westminster, and afterwards sent before the Lord the King here, in these words.

"To our Lord the King and his council, shew Peter Corbet and Henry, the son of Henry de la Pomeray, cousins and heirs of Roger de Vautort (a). That whereas, &c." The record then states, that the petitioners at the last parliament, had prayed the King that whereas the said Peter and Henry, father of Henry, sued by petition before King Edward I. and demanded by said petition the castle and manor of Tremynton, the towns of Esse, Sutton, Tamerton, and Makerton, and the manor of Calstok, with the fees appurtenant thereto as their right and reversion; by reason that the said Roger de Vautort, whose heirs they are, gave the same castle and manors to Richard Earl of Cornwall, in tail, with reversion to said Roger de Vautort and his heirs (b); and they produced the deed of Earl Richard (c), testifying the same; and that the matter of the petition was sent into the King's Bench, and the executors of Edmund Earl of Cornwall were commanded by a writ, to bring into Court all deeds, &c., touching the same premises; that a like writ was sent to the Keeper of the King's Wardrobe, but no other deed was found; that by the death of Henry, the father of Henry, the matter of the petition remained without day, by reason of the nonage of Henry the son, who now sues, and who, together with Peter, sued by petition at the last parliament, whereupon a procedendo was issued to the King's Bench, to proceed according to the process theretofore before them; but that the Judges of that Court would do nothing therein: Whereupon the petitioners prayed the King would be pleased to command them that they should proceed therein, according to right and reason, &c." (d).

In answer to this petition, it was ordered that the Justices of the King's Bench, having inspected the petition, and having called the King's Serjeants and others, and examined the record and process as well in the time of King Edw. I. as of the now King, they should proceed in the business as of right ought to be done. Nevertheless so that they proceeded not to judgment "*Rege inconsulto*."

The King's writ of procedendo directed to the Justices of the King's Bench, reciting the above facts issued accordingly.

And by virtue of another writ, the Treasurer and Chamberlains of the Exchequer, sent to the King's Bench the record and process before stated, of the time of Edward I., in which the pleadings upon the petition to the King and his council, are set out at full length, in which it appears, that John de Bensted, the King's clerk, brought into Court the deed of Richard King of the Romans, Earl of Cornwall, being a counterpart (e), whereby the said Roger

(a) The petition is in French, the remainder of the record in Latin.

(b) This gift being before the statute de donis, created a fee simple condition, so that Richard having issue might have aliened before 13 Edw. I.

(c) i. e. the counterpart, *infra* (e).

(d) *Vide* F. N. B. 153, 240.

(e) *Suprà*, (c) The form of this counterpart is remarkable. It begins thus:—*Richardus, Dei Gratia Romanorum Rex, semper Augustus, Omnibus ad quorum noticiam præsens scriptum pervenerit salutem et omne bonum: No-*

de Vautort granted to him in tail, the said castle and manors, with reversion to the said Roger. The deed of Roger de Vautort was also produced to the same effect. But as, on the inspection of these deeds, nothing was found whereby the Court could be certified of the King's estate in the premises, and as the Court was given to understand that certain deeds touching the same premises were in the custody of the executors of Edmund late Earl of Cornwall, it was commanded to Ralph de Hengham and others, the said executors, that having searched for such deeds and writings, they should have and certify the same to the King and his council at the next parliament. A venire was also awarded to the sheriff of Cornwall to cause to come thereon at the next parliament, 24 as well knights, &c. At this parliament came the said Peter, but Henry came not, because he was dead. And the executors returned that they had no deeds in their possession; but one of the executors acknowledged *ore tenus* that all the deeds, &c., which he had in his custody after the said Earl's death, he had delivered into the King's Wardrobe into the hands of John de Bensted by indenture. The sheriff returned the jury. And said Peter prayed that he might be admitted to show and prosecute his right in the premises. Whereupon it was asked him, wherefore Henry de la Pomeray his parcener did not sue with him? To which he answered, that the said Henry was dead, and his son and heir within age, and in ward; whereupon the justices would not proceed further in the business without the King's command; therefore said Peter was told he must sue to the King. In Easter Term, 8 Edward II., the King sent his writ of procedendo to the Justices of the King's Bench, reciting the above facts, and that the proceedings, by the death of Henry de la Pomeray, and the minority of his son now of age, remained unprosecuted.

Thereupon said Peter, and Henry the son, prayed the Court that they might shew their right to the premises. The King's attorney (and the King's serjeants especially called) appeared, and said that King Edward I. had been given to understand that certain deeds, &c. touching the said lands and tenements, were in the hands of the executors of the said Earl, and after his death were delivered by them into the King's Wardrobe, and they pray oyer thereof. A writ of certiorari was sent to the Treasurer of the Wardrobe to cause search to be made, and to certify the King thereupon. Day was given to the parties, who were ordered to have at the said day the deed remaining in their possession, and in the mean time that they should cause search to be made in Chancery concerning the right and estate of the King.

Here a great number of continuances are entered upon the roll, after which the parties appeared, and the deed of Richard Earl of Cornwall under seal, was brought into Court by Henry, the son of Henry, which deed is stated to agree verbatim with the one in-

verit universitas vestra nos recepisse et acceptasse feoffamentum Rogeri de Valle Torta, in hæc verba: Sciant præsentēs et futuri quod ego Rogerus de Valle Torta dedi concessi et hæc præsentī cartā meā confirmavi pro me et heredibus meis serenissimo domino Ricardo, Dei Gratia Romanorum Regi, semper Augusto, et domino Cornubiæ, &c.

rolled in the preceding roll. It was afterwards returned to the said Henry in the Bench, who was told to have it ready from day to day.

The Treasurer of the King's Wardrobe was again commanded to search for the deeds delivered into the wardrobe by one of the executors, and day was given to the parties accordingly.

The Court being desirous to be certified upon the tenor of the inquisitions on the death of Richard Earl of Cornwall, and of Edmund Earl of Cornwall his son, it was commanded to the chancellor that he should certify the King upon the tenor thereof.

It was also commanded to the Treasurer of the King's Wardrobe, that he should cause to be searched all the memoranda with him, and certify thereupon. The Treasurer of the Wardrobe hereupon returned, that Walter de Aylesbury deceased, when he was Comptroller of the Wardrobe of King Edward I., caused to be carried into the aforesaid wardrobe a chest fastened with a lock, in which were many muniments touching the lands and tenements of Edmund late Earl of Cornwall, but he pleaded his ignorance in what manner, when, and by whom the said chest was taken away; and he concludes with these words, "nevertheless, I believe that it was placed in the Tower of London, or at Westminster, to be kept as in the Treasury of the Lord the King; neither have I, or do I recollect that I ever had, in my possession any muniments or memoranda touching the premises." The chancellor returned, that as to the inquisitions of Richard Earl of Cornwall, they could not be found, but that the *inquisition of Edmund Earl of Cornwall appeared in a schedule annexed to the extent*, and which was to be found among the records of the 10th year of the now King. A great number of other mandates to the chancellor, and treasurer, and chamberlains, and continuances are entered on the roll.

At last the aforesaid Henry came at a day given, but Peter came not, because it was testified he was dead. And hereupon (6 Ed. II.) the King sent his writ to the Justices of his Bench, reciting that John Corbet the brother and heir of Peter Corbet, and Henry the son of Henry de la Pomeray had presented their petition to the said King and his council, reciting all the facts hereinbefore stated, and reciting also, that Roger Vautort, by fine, levied before the justices in eyre at Exeter, gave all the premises aforesaid to Richard Earl of Cornwall in tail, and that the Justices of the King's Bench could not proceed to judgment by reason of the deaths aforesaid; he, therefore, commanded the Justices of the King's Bench that they should proceed to examine all the proceedings aforesaid, and do justice to the said John and Henry. The parties appeared again in the King's Bench, and petitioned *de novo* on the ground of an alleged discrepancy in the premises in the two petitions to Edw. I. and II.

The transcript of the fine was afterwards brought into K. B. by certiorari, whereby it appeared, that in the 54th year of King Henry III., Roger de Vautort conveyed the Castle and Manor of Trematon, and sixty knights' fees (a) there belonging, in

(a) Post 465 (c).

Devon and Cornwall, and the Manor of Calstok, &c., to Richard Earl of Cornwall in tail, in consideration (int. al.) of 300*l.* sterling.

The proceedings appear to be then continued to Easter Term 1 Edward III., when that King by his writ, sent to the Justices of K. B., enclosing therein the petition of John Corbet and Henry Pomeray, the son, commanding them to proceed to a final discussion of the business, but not to give judgment "*Rege inconsulto.*"

The material facts stated in the former petitions are set forth in this, and that they would have had judgment, but that the Queen sent her counsel before the counsel of the Lord the King, to inspect the records and processes aforesaid, and that when they had heard the demand and seen the record and process, they could say nothing why the King ought not to deliver up the petitioners' inheritance; and that the Queen asked by her counsel if the said petitioners would take any gifts or land elsewhere. The petitioners then state that they have sued from parliament to parliament at great cost, and pray speedy right to be done them.

This last petition was sent by writ to the King's Bench, commanding them that having due regard to all the proofs therein mentioned, they should proceed to a final discussion, but not to give judgment "*Rege inconsulto.*"

In Trinity Term the record and process having been inspected, the sheriff of Cornwall was commanded to cause to come in the King's Bench the Wardens and Bailiffs of Isabella Queen of England, who then held the said castle, towns, &c., for the term of her life, by grant of the said King Edward III. (as they alleged) in order more fully to inform the King as well concerning his right as that of the Queen, to the castle, towns, &c. A day is given accordingly. At the day given, the petitioners appear, and there are various continuances until Hilary Term 5 Edward III., when the King sent his writ to the Justices of the King's Bench, commanding them to proceed further in the business, but not to give judgment, "*Rege inconsulto,*" and hereupon came again the petitioners, and prayed justice to be done them.

The King's Attorney says, that inasmuch as the petitioners sue against the King to have an ouster le main of the King as to the castle, manors, &c., as cousins and heirs of the aforesaid Roger de Vautort that they should shew to the Court how they are such cousins and heirs.

The said John and Henry then state the gift of their ancestor Roger to Earl Richard in tail, his dying seised thereof, the descent to Edmund Earl of Cornwall, the death of the said Edmund without heir of his body, whereby the right reverted to the said Roger as the donor. They then state in what manner the right descended from Roger de Vautort to themselves.

The Treasurer and Chamberlains of the Exchequer, and the Chancellor, are then commanded to certify the King as to the fine, *inquisitiones post mortem, &c.* The former sends into Court the tenor of the deeds of conveyance and the fine to Richard Earl of Cornwall, from Roger de Vautort; and the chancellor returns also into the King's Bench, that having searched the inquisitions remaining in Chancery, none were found returned after the death

of Richard Earl of Cornwall, *but that the tenor of the inq. p. m. of Edmund late Earl of Cornwall returned into Chancery, he, the said Chancellor sends to the King's Bench under his seal.*

Then follow the tenor of the writ and inquisition, 29 Edw. I. on the death of Edmund Earl of Cornwall (a), at the foot whereof is an examination by John de St. Paul (Master of the Rolls).

There are then several other mandates sent to the chancellor, to search for the inquisition of Richard Earl of Cornwall, to which he at last answers, that having searched the inquisitions as well of the time of King Henry III. from the 53d year, as of the time of King Edward I., no inquisition had been found of the lands and tenements belonging to the said Richard on the day of his death.

And hereupon the said John and Henry pray livery of the castle, manors, &c., as the next heirs of the said Roger de Vau-tort, and conclude with a verification (*si necesse fuerit*) of the gift and descent in form aforesaid. In consequence hereof a venire is awarded to the sheriff of Cornwall to inquire "if the said Roger gave the said tenements to the said Richard Earl of Cornwall in form aforesaid, and if the said Henry and John are the next heirs of the said Roger in manner as in the record aforesaid they have shewn to the Court or not."

Here are several continuances, by respiting the jury, until Michaelmas Term 12 Edw. III. when the King's Attorney came, and John Corbet, and the aforesaid Henry, the son of Henry, on the quarto die having been solemnly called came not, but he had theretofore appeared in Court in Trinity Term in the said 12th year, as appears by the roll of Hilary Term, 12 Edw. III. Therefore a moiety of the aforesaid castle, manors, &c., was excepted, &c., and the aforesaid John sued without him, &c. And the jury between the Lord the King and the said John, was put in respite until Easter Term, as appears by the roll of Michaelmas Term, 12 Edward III.

This is the conclusion of the record, and no verdict or judgment seems to have been given. The pendency of these proceedings which appear to have terminated in a compromise (b), did not prevent the manors of Trematon (c) and Calstock being included in the parliamentary grant to the Black Prince (d), in the 11th year of this King, by which, however, it appears that Hugh d'Audeley, who had married Margaret, widow of Edmund, Earl of Cornwall, and afterwards relict of Piers de Gaveston, Earl of Cornwall, was then seised of the manor of Trematon. In the 46th Edward III., Ralph, Earl of Stafford, and Margaret his wife, daughter and heir of Hugh de Audeley,

(a) See this inquisition, *post*, 466.

(b) *Ante*, 142.

(c) In 1 Edward III., William de Ferrers died seised of 11 knights' fees in Wynardston in Devonshire, ut de Tremeton baroniâ, and of one carucate of land in Trebenna, Cornwall, de Tremeton baroniâ. 2 Calend. Inq. post mortem, 10.

John de Cobham in jure Alicie uxoris sue, died seised of land in Trematon in the county of Devon, *ibid.* fol. 73.

William de Ferrers died seised of lands in Loderton, Poscelynych and Bromyston, ut de baroniâ de Tremyngton, 10 Edward III. *ibid.* 73.

William de Ferrers was seised, pro sex capellanis, of Threkamlet, ut de honore de Tremeton, remainder to the same William, 18 Edward III. *ibid.* 122.

(d) *Post*; 474.



Earl of Gloucester, were seised of the manor of Tremyngton in the county of Cornwall (a). This manor was also in the hands of a subject, in the reign of Henry IV. (b). The alienations made by Richard II. were resumed in this reign by Prince Henry, afterwards Henry V. (c).

*Inquisitio post mortem Edmundi comitis Cornubiæ, as set out in the preceding record (d).*

The King to his beloved and faithful Walter de Gloucester, his escheator beyond Trent, greeting. Inasmuch as Edmund, Earl of Cornwall, who held of Us in chief, hath departed this life, as we have been informed, We command you that all the lands and tenements of which the said Edmund was seised in his demesne as of fee in your bailiwick, on the day on which he died, you do take into Our hands without delay, and do cause the same to be safely kept until We shall thereupon otherwise command: And that by the oath of good and lawful men of your said bailiwick, by whom the truth of the matter may be the better known, you do diligently inquire how much land the said Edmund held of Us in chief in your bailiwick on the day on which he died, and how much of others, and by what services, and how much those lands and tenements are worth yearly in all issues, and who is his next heir, and of what age; and that the inquisition thereupon distinctly and openly made, under your seal, and the seals of those by whom the same shall be made, you do send to Us without delay, and this writ: Witness the King, at the Rose, the 26th day of September, in the 28th year of Our reign.

An inquisition made at Restormel, before the escheator of the Lord the King, on the thirtieth day of November, in the 29th year of the reign of King Edward, of the lands and tenements of which Edmund, Earl of Cornwall, was seised in his demesne as of fee, the day on which he died, in the county of Cornwall, that is to say, what he held of the Lord the King in chief and what of others, and by what services: and how much those lands are worth by the year in all issues, and who is his next heir, and of what age, by the oath of Ralph Blayon, Reginald de Botterell, knights, Michael Port, Philip Medras, Benedict Bastard, John Reskenner, Ralph de Glyn, Walter Tremur, John Treslinen, William de Treville, Odo de Treres, William de Glunien, John de Tresworgy, Wyman Tyrel, Richard de Reskaretmur, Thomas de Wainford, Walter de Okeburn, Stephen de Trewint, John de Trelawney, Robert de Trewinneke, Nicholas de Morton, Thomas le Chancellor, Robert de Bodmin, John de Kilgash, John de Lymays, Richard de Tredeford, Odo de Rupe, Reginald de Trelouthas, Michael de Bray, Bernard Maisack, and Robert le Brun, who say, upon their oath, that the said Edmund Earl of Cornwall held, in his demesne as of fee, on the day on which he died, the castles, manors, and tenements under-

(a) Calend. Inq. post Mortem, vol. i. 320.

(b) Trematon.—De Johanne Cole et ux. occasionatis ad reddendum computum de exitibus castri et manerii de Trematon et aliorum maneriorum in comitatibus Devoniz et Cornubiæ quæ fuerunt Wilhelmi de Nevill ad vitam.—Michaelis Recorda 7 Henr. IV. rotulo 10. (Jones's Index Exch. Records.)

(c) Vide 8 Co. Rep. 23 a; 3 Rot. Parl. 526, 531, 2.

(d) See, also, Calend. Inq. post Mortem, 28 Edw. I. vol. i. 156.

written, that is to say : The castle and manor of Launceneton, with the appurtenances, the castle and town of Restormel, and the borough of Lostwithiel, with the appurtenances, the castle of Tyn-tagel, the manor of Bosynny, and the borough of Tyn-tagel, and the manor of Clymmeslond, the manor with the borough of Helleston in Kerrieth, the manor of Helleston in Tregashire, with the borough of Camelford and Hamlet of Penmayn; the manor with the borough of Lyskereth, the manor of Tibeste with the borough of Ponsmur, the manor of Penkenek, certain tenements in Talskedy, the manor of Tiwarnheil, the manor of Tewyngton, the manor of Penlyn, the manor of Moreske, and manor of Rellaton, with the appurtenances and the pleas of the county courts of Cornwall, with the hundreds of Pedershire, Pudershire, Trigashire, Lisnewych, Stratton, Estwevelshire, Westwevelshire, Kerrier, and the third part of the hundred of Penwith, with the issues of mines of tin, wreck of the sea, the prisage of wine, with the fee-farms underwritten in the county aforesaid of the Lord the King, in chief, by the service of two knights' fees.

Also they say, upon their oath, that the same Earl held, on the day on which he died in his demesne, as of fee tail, the castle and town of Trematon, with the borough of Asshe, and the manor and town of Calistoke, with the appurtenances, because they say that one Roger de Valletort, heretofore lord of the castle of Trematon, and of the town, borough, and manor of Calistoke, gave the aforesaid castle, town, and borough, with their appurtenances, to Richard of noble memory, late King of Germany, to have and to hold to him, and the heirs of his body issuing, together, with the knights' fees and advowsons of churches to the same castle pertaining (a).

Also they say, upon their oath, that there is  
*Castle and Town of Launceneton* (b). there a certain castle which is worth nothing by the year as to issues; the borough of Launceneton, in the hands of the burgesses of the same town, at fee-farm, rendering by the year 100s., at two terms, namely, at the feast of Easter and St. Michael, in equal portions; also they render at the feast of St. Michael 7s. 6d. for a certain escheat in the same borough newly arrented; also they render at the feast of St. Michael one pound of pepper for the Guildhall of the same town, or twelve pence; also certain tenants of Hemeston (c) in Devon, render at the gate of the castle of Launceneton 50s., at two terms of the year, half at Easter and the other half at the feast of St. Michael, of ancient custom; also certain tenants in Lodewan, Trevelyast, Dowanna, and Estwevelshire, namely, Richard le Walays, Stephen Crabbe, Andrew Patreda, and Peter Hurdyn, render by the year, at the gate of the castle aforesaid, for their watchings (d),

(a) This latter property formed the subject of the petition of right, *suprà*, 460.

(b) *Vide post*, 475.

(c) In 7 Edward II. Joan Cripyn held the hamlet of Hemeston Arundel, per servitium 50 solidorum annuatim ad castrum de Launceneton solvendum, 1 Abbr. Rot. orig. in Scio 203 b. ante 255 n. In 29 Edw. III. John Stretche held two carucates of land, &c., in Emmyston Arundel co. Devon, ut de castro de Launceston, 2 Calend. Inq. post Mortem, 192.

(d) i. e. by way of commutation for castle-guard.

of ancient custom, for the lands and tenements which they hold in the places aforesaid, 68*s.* 8*d.*, payable at the feast of St. Michael; also there is there one park with deer, and worth by the year for the deer in herbage 10*s.*; also a moiety of the amerciaments of the town of the prior of Launceston, which the earl recovered in the eyre of the justices for assize broken, worth by the year 6*s.*; also there is there, in the aforesaid park, a certain water-mill, and it is worth by the year 4*s.* Sum 12*l.* 7*s.* 2*d.*

Also they say, upon their oath, that there is  
*Restormel, with* there a certain castle which is worth nothing  
*the Town and* by the year as to issues; there is there a cer-  
*Castle.* tain small garden, and it is worth by the year

6*d.*; there is there a certain park with deer, and it is worth by the year for the same 20*s.*; there is there a certain meadow in the same park, and worth by the year 6*s.* 8*d.*; there is there a certain water-mill, and worth by the year 26*s.* 8*d.*; also there are in the said park certain cockshetes (a); and they are worth by the year 12*d.*, and the pannage of the same park is worth by the year 3*s.*, and a certain custom of ale between Lostwithiel and Restormel, near Pankokes Cross, worth by the year 6*d.*; there is there a certain fishery in the water of Fawe, under the said castle, and it is worth by the year 50*s.*; and the same fishery extends from the port of St. Salveors as far as the bridge of Reprenna (qu.), as long as two oxen joined under one yoke can proceed together in the said water; and there are there two conventionaries, who hold one ferling and a half of land, and render yearly 9*s.* 4*d.*, at the four principal terms of the year, and each of them shall come to the lord's chase, in the park, once in the year, and the works are worth 2*d.*; also there are there thirteen villeins, who hold in villenage thirteen ferlings of land, and they render by the year at the four terms aforesaid, 77*s.* 1*d.*, and every of them shall come to the lord's chase in the park once in the year, and those works are worth 13*d.*; and the chevage of villeins (b) there is worth by the year 9*d.*; the pleas and perquisites of courts there are worth by the year 5*s.* Sum 10*l.* 21*d.*

Also they say, upon their oath, that there are  
*Lostwithiel.* there in the borough aforesaid 305 burgages which render by the year, at the feast of St. Michael, 8*l.* 13*s.* 3½*d.*; also there are there three water-mills, and they worth by the year 12*l.*; the sullage there in the water of Fawe is worth by the year 6*s.* 8*d.*; the fairs there, on the day of St. Bartholomew, are worth by the year 2*s.*; the chevage of villeins (b) there is worth by the year 2*s.*; the pleas and perquisites of courts there are worth by the year 50*s.*; also the cellar of the great hall, with the houses of stannary there, is worth by the year 66*s.* 8*d.* Sum 27*l.* 7½*d.*

(a) In the original "quedam volate que dicuntur 'cockshetes,'" Ducange gives no explanation of the word "volata;" but cites the following:—"Et dimidiam hidam, quæ fuit Gaufrid, cum prato quod ad easdem terras pertinet, et unam croftam et volatam quam Hemmingus presbyter solebat habere, et pannagium de propriis porcis suis. Monastie. Anglic. ii. 139.

(b) Capitagium garcionum, vide supra.

Also they say upon their oath, that there is there a certain castle which is worth by the year as in herbage within the close, 12*d.*; and there are there fourteen freeholders, who render by the year for rent certain 20*s.* 8½*d.*, and for berbiage 2*s.* 10*d.*, at the feast of St. Michael; also there are there fourteen conventionaries who hold eight acres Cornish and one ferling of land, and render by the year 11*s.* 1½*d.* at the four principal terms of the year; and there are there thirty-eight villeins, who hold twenty acres Cornish and one ferling of land, and render by the year, with landiok, 14*l.* 9*s.* 7½*d.*; also there is there one foreign tenant, who renders by the year, for landiok, 4*s.* at the aforesaid four terms; and there are there three moors in Halimur, Treslasta and Pendrom, which are worth by the year 20*s.*; and pasture within the rabbit warren (conyngariam) is worth by the year 2*s.*; and a certain custom of boats is worth by the year 10*s.*; and a certain custom there (quandam consuetudinem pro liberè portando ad hundredum) is worth by the year 12*d.*; and there are there three water-mills, worth by the year 66*s.* 3*d.*, and the chevage of villeins there is worth by the year 20*d.*; the pleas and perquisites of Courts of the manor are worth by the year 20*s.*; also there are there in the borough of Tyntagel certain tenants in burgage, who render by the year, for rent certain, at the feast of St. Michael, 11*l.* 9*s.* 2½*d.*; the fairs there, once in the year, are worth by the year 3*s.*, and the chevage of villeins is worth by the year 12*d.*; the pleas and perquisites of the borough are worth by the year, 10*s.* Sum 39*l.* 13*s.* 10*d.*

Also they say, upon their oath, that there are there two water-mills, which are worth yearly 4*l.* 6*s.* 8*d.*; and there are there two woods, the profits whereof, as in pannage, are worth by the year 2*s.*; and there is there a certain pasture, which is called Goendiwrath, and it is worth by the year 40*s.*; and the turbary in the same is worth by the year 40*s.*; and there are there eighteen freeholders, who render yearly, at the four principal terms of the year, 50*s.* 4*d.*, and for berbiage at Easter 7*s.*, and for bede of the mill, at the same term, 6*d.*; and there are there seventy-six conventionaries, who hold twenty-eight Cornish acres and a half and one ferling and twenty-eight parcels, and render by the year, at the feast of St. Michael, 27*l.* 10*s.* 10*d.*; and there are there eleven villeins, who hold four acres and a half, and the third part of one acre Cornish and one croft, and render by the year, at the four principal terms of the year, 77*s.* 8*d.*; and John de Gamme renders by the year, at the feast of St. Michael, for the mill dam of Talcarn 6*d.*; and the chevage of villeins there is worth by the year 2*s.*; and the toll of tin there is worth yearly 12*d.*; the pleas and perquisites of the Court of the manor aforesaid are worth by the year 40*s.*; also the burgesses of the borough of Helleston in Kerrieth, render yearly at fee-farm 6*l.* 13*s.* 4*d.*, at two terms of the year, namely, at the feasts of Easter and St. Michael, for the borough aforesaid; the same burgesses render for a certain burgage escheated there 8*s.* 4*d.* at the feast of St. Michael. Sum 51*l.* 6*d.*

Also they say, upon their oath, that there are there two mills, one a corn and the other a fulling-mill, and they are worth by the year 53s. 4d.; and there is there a certain pasture which is called Heuxcesden, which is worth by the year 11s.; and there are there two woods, the profit whereof as in underwood, pannage, honey, and fern, (feugera) is worth by the year 5s. 6d.; and there is there a certain park with deer, and worth in herbage for the deer 20s., and for agistment 10s. And there are there twelve freeholders, who render by the year at the four principal terms of the year 34s.; there are there twenty-three conventionaries, who hold six acres and a half and one ferling and a half eight landiok and one plot (placeam) Cornish, and render by the year 56s. 8½d., at the aforesaid four terms, and of berbiage 8d. at the same terms; and there are there eighty-one villeins, who hold in villenage thirty-seven acres one ferling and the third part of one ferling of land Cornish and eleven landiok, and render by the year 10l. 5s. 8½d. at the said four terms, and for berbiage 70s. 3½d. at the feasts of Easter and St. Michael; and the chevage of villeins there is worth by the year 3s.; the pleas and perquisites of courts there are worth by the year 40s. Sum 25l. 10s. 2½d.

*Manor of Helles-ton, in Tregashire, with the Borough of Camelford and Hamlet of Penmayn.* Also they say, upon their oath, that there is there a certain pasture, which is called Knottlesford, which is worth by the year 20s., and a certain other pasture there which is called Gosehull, worth by the year 8s., and the turbary in the same pastures is worth by the year 20s.; and there is there a certain park with deer, and the

herbage in the same is worth for the deer 40s.; and there are and in the hamlet of Penmayn, thirty-nine freeholders, who render by the year 115s. 6½d. at the feast of St. Michael, and for aid of the same 2s. 11d. at the same term; and Stephen de Trowaynt holds by charter three water-mills, at fee-farm, and he renders therefore by the year 6l. 13s. 4d. at the feasts of Easter and St. Michael; and there are there thirty-three conventionaries, who hold ten acres and one ferling of land Cornish, and nine landiok, and they render by the year 9l. 14s. 7d. at the four principal terms; and there are there and in the hamlet aforesaid, seventy-eight villeins, who hold thirty-eight acres and an half, and the third-part of one ferling of land Cornish, and twenty-five landiok and two pieces of meadow, and render by the year 22l. 5s. 4d., at the four principal terms, and for aid of the feast of St. Michael, 56s.; and there is at Penmayn a certain ferry (passagium) which is worth by the year 10s.; and two tenants there, render for multure of mill and one piece of land at the feast of St. Michael, 3s. 6d., and the chevage of villeins there is worth 3s. 8d.; the pleas and perquisites of courts there are worth by the year 66s. 8d.; also there are there in the borough of Camelford sixty-two burgesses, who hold sixty-two burgages (a), and render by the year 4l. 4s. 4½d.; the

(a) Here, as at Grampound, *post*, 472, n., the number of burgesses and burgages correspond.

fairs there, once in the year, are worth 5*s.*; the pleas and perquisites of courts there are worth by the year 13*s.* 4*d.* Sum 61*l.* 2*s.* 3*d.*

Also they say, upon their oath, that there is there a certain water-mill, which is worth by the year 15*s.*, and a certain fishery there, in the water of Loo, worth by the year 13*s.* 4*d.*, and a certain carriage (carriagium) of wine there worth yearly 2*s.*; and there are there two woods, the profit whereof is worth by the year, as in pannage, 2*s.*; and there is there one park in which are deer, and worth in pasture for the same, by the year 9*s.*, and the *cockshetes* (a) of the same park are worth by the year 15*d.*; there is there a certain other park without deer, and worth by the year, as in herbage, 13*s.* 4*d.*; and there are there twenty-four freeholders in socage, and they render yearly, at the four principal terms of the year, 7*s.* 6½*d.*; and there are there forty-one conventionaries who hold eighteen acres one ferling and an half of land Cornish, and ten pieces of land, and render by the year 8*l.* 4*s.* 8½*d.* at the four terms of the year, and for aid of the same and of the villeins at the feast of St. Michael, 50*s.*; and berbiage of the same, and of the villeins at Easter, 13*s.* 5*d.*; and there are there six villeins who hold seventeen acres and an half of land, and a fourth part of one ferling Cornish, and render by the year 108*s.* 10½*d.* at the four principal terms of the year, and the chevage of villeins there is worth by the year 12*d.*; the pleas and perquisites of courts there are worth by the year 50*s.*, and the burgesses of the borough of Liskereth render by the year, for fee-farm for the borough aforesaid, 18*l.* at two terms of the year, namely, at the feasts of Easter and St. Michael, the same burgesses render for a certain burgrave there escheated, 2*s.* 6*d.* at the terms aforesaid. Sum 43*l.* 19*s.* 17½*d.*

Also they say, upon their oath, that there are there two water-mills, and they are worth by the year 53*s.* 4*d.*; and there is there one fulling-mill, which is worth by the year 13*s.* 4*d.*, and the pasture of the demesne there worth by the year 17*s.*; there is there a certain wood, the profit whereof is worth by the year, as in pannage, herbage, and honey, 4*s.* 6*d.*, and the turbary there is worth by the year 6*d.*, and the fishery there is worth by the year 6*d.* And there are there twenty-two freeholders, who render by the year for rent certain, at the four principal terms of the year, 65*s.* 5*d.*, and for aid of the same, at the feast of St. Michael, 7*s.* 8*d.*, and for berbiage of the same, at the same term, 5*s.* 2*d.*; and there are there twenty-eight conventionaries, who hold fifteen Cornish acres, and render by the year, at the four terms, 11*l.* 14*s.* 11*d.*; and there are there twenty-one villeins, who hold six acres and an half and one ferling Cornish, and render by the year 111*s.* 6*d.*, at the four terms of the year aforesaid; and for aid of the same at the feast of St. Michael 20*s.*; and the same villeins render by the year, at the feast of St. Michael, for mul-

(a) Here simply "volate," vide ante, 468.

(b) i.e. Grand pont, since Grampound.

ture (de molecto), 38s. 2½d.; and Thomas de Pridias holds bailiwick of Poudreshire by charter, rendering by the year, at the feast of St. Michael, 40s., and the chevage of villeins (a) there is worth by the year 7d.; the pleas and perquisites of courts there are worth by the year 40s.; and there are in the borough of Ponsmur thirty burgesses, who hold thirty burgages (b), and render by the year 30s. at the feasts of Easter and St. Michael; and the same burgesses render by the year, at the same terms, for a certain small parcel of waste (particula vasti) adjacent to the same borough, 2s. Sum 33l. 4s. 7½d.

Also they say, upon their oaths, that there are  
*Manor of* seven freeholders who render by the year, at the  
*Penkeneh.* feast of St. Michael, 10s. 8½d.; and there are there nine conventionaries who hold one acre and an half and one ferling Cornish and two acres English and two crofts, and render by the year 29s. 5½d., at the four principal terms of the year; and there are there six villeins, who hold half an acre one ferling Cornish, four parcels of moor and one croft Cornish, and render by the year 16s. 0½d., at the four principal terms; and the chevage of villeins (a) there is worth by the year 10d.; the pleas and perquisites of courts there are worth by the year 12d. Sum 58s.

And they say, upon their oaths, that there  
*Certain Tenements* are there two conventionaries and one villein,  
*in Talskedy (c).* who hold three Cornish acres, and render by the year, at the feasts of Easter and St. Michael, 60s. Sum 60s.

Also they say, upon their oaths, that there is  
*Manor of* there the moiety of one water-mill, and it is worth  
*Tywarnail.* by the year 12s., and the — and pasture in the wastes are worth by the year 2s.; and for a road for the carriage of sand there, by the year, 2s.; and the toll of tin there is worth by the year 12d.; and there are there twelve freeholders who render by the year, for rent certain, at the feast of St. Michael, 71s. 2d.; and there are there twelve conventionaries who hold five Cornish acres and one plot (plac-  
*ceani*) of land, and render by the year 68s. 6d. at the four principal terms of the year; and there are there fifteen villeins, who hold ten Cornish acres and one ferling, and render by the year 110s. 0½d., at the four principal terms of the year; and the same villeins hold four moors there, and render by the year, at the same terms, 6s.; and John de Ponkenly holds the moor of Goenhanach, and renders at the same terms 21d.; and Michael de Kelercroale holds Laudam and Kellialpha, and renders by the year 4s.; and the chevage of villeins (a) there is worth by the year 12d.; and the tenants of Rellaton render by the year for multure (de mellotte), at the said terms, 10s.; the pleas and perquisites of courts there are worth by the year 20s. Sum 15l. 13s. 1½d.

(a) Capitagium garcionum.

(b) *Vide, ante*, 470, (a).

(c) Though Talskedy is not here called a manor, yet in Jones's Index to the Exchequer Records, we find the following reference to the records of T. 9 H. 4, rot. 5. "Taskydy—De Roberto Thorley exonerando de exitibus manerii de Talskydy et aliorum in comitatu Cornubiæ."

Also they say, upon their oath, that there are there two water-mills, and they are worth by the year 46s. 8d.; and the pasture in Wellan is worth by the year 22s. 11d.; and there is there a certain wood, the profit whereof, as in herbage, pannage, and honey, is worth by the year 6s. 6d.; and a certain fishery there is worth by the year 4s., and a certain turbary there is worth by the year 18d., and the toll of tin there is worth by the year 6s.; and there are there eighteen freeholders (a), who render by the year, for rent certain, and for their works, 8l. 10s. 4½d., at the four principal terms of the year; and there are there forty-three conventionaries who hold fifteen acres and the sixth part of one furling of land Cornish, and render by the year, at the four principal terms, for rent certain, works, and fines of tin, 14l. 11s. 2d.; and there are there eleven villeins, who hold in villenage three acres and an half of Cornish, and render by the year, at the aforesaid terms, 4l. 22d., and for their berbiage 14s. 7d., at the same terms, and the rent of the bede of the mill there of Pentewyn is worth by the year 9d., and the chevage of villeins there is worth by the year 5d.; and there are there certain wastes in Wellan, which are worth by the year 61s.; the pleas and perquisites of courts there are worth by the year 50s. Sum 37l. 16s. 8½d.

Also they say, upon their oaths, that there is there a certain garden, which is worth by the year 6s. 7d.; *Manor of Penlyn (b).* and there is there a certain park with deer, and it is worth by the year, as in herbage and underwood, 17s. 4d., and the *cockshetes (c)* in the same park are worth by the year 9d.; and there are there two water-mills, and they are worth yearly 23s. 6d., and one fulling-mill, worth by the year 4s. 2d. And there are there six freeholders, who render by the year for rent of assise certain, and their works, 9s. 8d., at the four principal terms, and one pound of pepper, which is worth 8d.; and there are there twenty-two conventionaries, who hold four acres and one furling of land Cornish, and seventeen acres English, and render by the year, at the four principal terms of the year, 4l. 23½d.; and there are there two villeins who hold three acres and one furling of land, and they render by the year for rent certain, and for their works, 5s., at the same terms; and the chevage of villeins is worth by the year 11d.; the pleas and perquisites of courts there are worth by the year 6s. 8d. Sum 71. 16s. 6½d.

Also they say, upon their oath, that there is there a *Morest (d)* certain garden which is worth by the year 2s.; and there is there one carucate (e) of land in demesne, which contains six score acres and an half, which is let to farm to conventionaries and villeins, rendering, therefore, by the year, 64s. 6d. at the feasts of Easter and St. Michael; and a certain piece of meadow there worth by the year 12s. 6d.; there is there a certain wood, the profits whereof as in pannage and herbage, is worth by the year 16s. 8d.; and John de Trymordigan holds the moiety of three water-mills, and renders therefore

(a) *Vide post*, Appendix K. (b) *Vide post*, 476. (c) *Ante*, 468, 471.  
(d) *Vide post*, 476. (e) *Ante*.



yearly, at the feasts of St. Michael, 66s. 8d.; and the other moiety of the aforesaid mill is of the inheritance of the aforesaid John, rendering therefore by the year, at the same terms, 6s. (a); and the same John holds a moiety of one fulling-mill, and renders therefore by the year, at the feast of St. Michael, 2d., and the other moiety of the same mill is worth by the year 6s. 8d.; and there is there a certain wood, the profit whereof as in herbage, pannage, and honey, is worth by the year 12s.; and there are there twenty freeholders who render by the year, for rent certain, 39s. 2½d., at the four principal terms, and for aid at the feast of St. Michael 10s. 2d., and for bed of the mill, 16s. at the same time; and there are there twenty conventionaries, who hold eight Cornish acres of land and four parcels, and render by the year, at the same terms, 9l. 7s. 6½d.; and there are there nineteen villeins who hold thirteen Cornish acres and two parcels, and render by the year, at the terms aforesaid, 10l. 10s. 5d.; and the chevage of villeins there is worth by the year 4s.; and the turbary there is worth by the year 13s. 4d.: and Matilda Eliot renders by the year, at the feast of St. Michael, one pound of pepper, which is worth 12d.; the pleas and perquisites of courts there are worth by the year 50s. Sum 34l. 14s. 10d.

## APPENDIX D.

*Petition of Edward Prince of Wales, (Son of Henry VI.,) from the Parliament Roll of 38 Henry VI., in which the Three Charters granted to the Black Prince are set out in hæc verba.*

29. Also a certain other petition was exhibited to the Lord the King in the parliament aforesaid in the following (b) tenor of words: (c) *To the Kyng oure Sovereigne Lord, Besecheth mekely your moste humble furst begoten Sonne, Edward, Prince of Wales, Duke of Cornwaille, and Erle of Chestre, That where Kyng Edward the IIIde, somtyme Kyng of Englund, youre full noble Progenitour, created his furst begoten sonne, Edward, Duke of Cornwaille and Erle of Chestre; and by the assent and counsell of Prelats, Duks, Erles, Barons, and othir in his pluin parlement, the XVII day of March, the XI yere of his reyne, made to and for his said furst begoten sonne, grauntes, ordinaunces, annexions, and unions, by his letters patentes accordyng to this tenour here ensewyng: (d) Edward, by the grace of God, King of Englund, Lord of Ireland, and*

(a) Note the diversity between the holding of these two moieties.

(b) "Sub eo qui sequitur tenore verborum."

(c) It is believed that this is the first time in which this charter has appeared in an English form, with the exception of a most inaccurate translation in the English editions of Lord Coke's Reports, part viii. 8., which was used at the trial.

(d) Those parts of the petition which are in English in the parliament roll are printed in italics as far as page 479.

Duke of Aquitaine, To his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all bailiffs, and lieges, greeting : Amongst the glories of royalty (a) We esteem this the chiefest, that it be fortified by a suitable distribution of orders, dignities, and offices, supported by sound counsels, and upheld by the strength of the brave ; and inasmuch as many hereditary titles in Our kingdom, as well by the descent of inheritances, according to the law of this kingdom, to co-heirs and parceners, as also by default of issue, and by various events have come to Our royal hands, whereby Our said kingdom hath long time suffered great deficiency in names, and honors, and in the dignity of ranks, We therefore earnestly meditating those things whereby Our kingdom may be adorned, and whereby Our said kingdom and the holy church thereof, and the other lands subject to Our dominion, may be more securely and honourably defended against the attempts of their enemies and adversaries, and desiring to dignify the chief places of Our kingdom with their antient honours, and turning Our attention closely to the person of Our well beloved and faithful Edward, Earl of Chester, Our first begotten son, and We wishing to honour the person of Our said son, have, with the common consent and counsel of the prelates, earls, barons, and others of Our council in this Our present parliament at Westminster, upon Monday next after the Feast of St. Matthias the Apostle last past, being assembled, given to Our said son the name and honour of Duke of Cornwall, and have constituted him Duke of Cornwall, and girt him with a sword, as behoveth. And that there may be no doubt hereafter, (b) what, or how much the same duke, or other dukes of the same place for the time being, under the name of the said dukedom ought to have, Our will is, that all in specialty which to the said dukedom doth belong be inserted in this Our charter. Therefore, for Us and Our heirs, We have given and granted, and by this Our charter confirmed to Our said son, under the name and honour of duke of the said place, the castles, manors, lands, tenements, and other things underwritten, that he the state and honour of such duke may uphold according to the nobility of his race, and the charges and burthens thereof the better to support, that is to say : The shrievalty of Cornwall, with the appurtenances, so as the said duke, and other dukes of the same place for the time being, do make, constitute, and appoint sheriffs of the said county of Cornwall at their

(a) " Regni insignia."

(b) " Et ne in dubium verti poterit aliquantulum in futuro." From this expression it would seem that the enumeration of parcels was merely declaratory of that which had from old times constituted the earldom of Cornwall, often called in records " feodum de Moretonia," from the original possessor (ante, 140) ; and King John who was also Earl of Mortagne and Cornwall, (Mann. Exch. 370, 6). Thus in Testa de Nevill, 192, we find " Qui dic'nt q'd Thom' de Cirencestr' tenet unum feodum in Wodehiwys de Thom' de la Haulle, et Thom' de Andr' de Cardinan, de hon' de Cardinan, in Cornub', de feodo de Moretoine." " Et q'd Will'us de Cantilupo tenet duo feoda in Hemeston de feod' de Moreton set nescit' ut de d'no Rege in capite vel de Comite Cornub'," ib. And though the honor of Trematon was in the hands of Reginald de Valletorta, in the reign of Henry III., this honor seems to have still been considered as parcel of the earldom. Thus in Testade Nevill, 193, we find, 21 Edw. I. Et quod Will'us de Ferariis tenet unum feodum de feodo de Moreton in Neweton et Poselynych, de honore Reginaldi de Valletorta de Tremathan.

will and pleasure, and to do and execute the office of sheriffs there as heretofore it used to be done, without any hindrance of Us or Our heirs for ever; as also the castle, borough, manor, and honour of Launceneton (*a*), with the park there, and other its appurtenances in the counties of Cornwall and Devon; the castle and manor of Tremeton (*b*), with the town of Saltesh, and the park there, and other its appurtenances in the said counties; the castle, borough, and manor of Tyntagell, with the appurtenances in the said county of Cornwall; the castle and manor of Rostormel, with the park there, and other its appurtenances in the same county; and the manor of Clymmeslond, with the park of Kerribullok, and other its appurtenances; Tybeste, with the bailiwick of Poudershire, and other its appurtenances; Tewynton, with the apurtenances; Helleston (*c*) in Kerrier, with the appurtenances; Moresk (*d*), with the appurtenances; Tewernaill, with the appurtenances; Pengkneth, with the appurtenances; Penlyn (*e*), with the park there, and other

(*a*) Thomas, son of Odo le Ercedekne, held the manor of Laundoghe, ut de Launceneton Castro, 2 Edw. III. Calend. Inq. post mortem, vol. ii. 20.

Henry de Keligrew held 27½ knights' fees in Restasewyt, de honore de Launceneton, 6 Edw. III. ib. 89.

The same held the manors of Elerkby, Laurihorne, and Laundegi, ut de castro de Launceneton, 5 Edw. III. ib. 38.

John de Dynham held the manor of Bodarde, ut de honore de Launceneton, 6 Edw. III. ib. 49.

Ralph de Bello Prato held Trewithey, ut de castro de Launceneton, 8 Edw. III. ib. 59.

John de Cobham jure Aliciæ uxoris suæ, held the manor of Hilton per servitium 10s. reddend' ad castrum de Launceneton, 10 Edw. III. ib. 73.

An inquisition was taken at Launceston Castle, de cur. vocat de gayt in porta Castri ibidem cum sectatoribus ejusdem; viz. in Landreine, Trewidia Lyner, Hordin et Dowena, 11 Edw. III. ib. 82.

John de Hamely held the manor of Alet, ut de honore de Launceston, 21 Edw. III. ib. 134.

Henry de Willington held the manor of Fawiton, ut de castro de Launceneton, 23 Edw. III. ib. 152.

Ranulphus de Albo Monasterio held the Castle of Sully, with the islands, ut de castro de Launceston, 22 Edw. III. ib. 143.

Margaret de Monte Hermerii held the manor of Lantyen ut de honore de castro de Launceneton, 23 Edw. III. ib. 157.

William D'Aubeney held the manor of Fowyton, the manor of Trenay cum dominio de Foweton, and lands, &c. in Pohlman and Uske ut de castro de Launceneton, 48 Edw. III. ib. 333.

Guido de Brienne pro quatuor capellanis de capella Beatæ Mariæ de Stapton, held in Alington co. Devon, 1 messuage and 9 furlongs of land, ut de castro de Launceston, 50 Edw. III. ib. 356.

Et quod Joh'es de Arundel tenet Hemmeston Bubba (afterwards called Hemmeston Arundel, ante 467, n) de comite Cornub. in socag' per servitium 50s. per annum, solvend' apud Landestaveston, Testa de Nevill, 193.

(*b*) *Ante*, 465, 475, (*b*).

(*c*) Helston held, (2 Edward II.) by John le Seneschal, Calend. Inq. post mortem, vol. i. 232. (3 Edw. II.) by Robert de Tony, and Matilda, his wife, ib. 286.

Henry de Keligrew was seised of one acre of land in Pengelly, ut de Heliston maner', 5 Edw. III. Calend. Inq. post mortem, vol. ii. 9.

(*d*) Held 32 Edw. I. by Thomas Dewy, Calend. Inq. post mortem, vol. i. 195.

(*e*) John de Dynham held Penalyn, 5 Edw. III. Calend. Inq. post mortem, vol. i. 39.

Ralph de Belloprato held, 8 Edw. III. 1 messuage and 1 carucate of land in Penhalym, ib. 59.

its appurtenances; Rellaton(a), with the bedelry of Estwyneleshire, and other its appurtenances; Helleston, in Trygshire, with the park of Hellesbury, and other its appurtenances; Lyskeret(b), with the park there, and other its appurtenances; Calystock, with the fishery there, and other its appurtenances; and Talskydy, with the appurtenances, in the same county of Cornwall; and the town of Lostwithiell in the same county, with the mills there, and other its appurtenances; and Our prize and customs of wines in the said county of Cornwall; and also all the profits of Our ports, within the same county of Cornwall, to Us belonging, together with wreck of the sea, (c) as well of whales and sturgeon and other fishes which do belong to Us by reason of Our prerogative, as whatsoever other things belong to such wreck of the sea, with the appurtenances in all Our said county of Cornwall; and the profits and emoluments to Us belonging, of Our county courts holden in Our county of Cornwall, and of hundreds and courts thereof in the said county; as also Our stannary in the said county of Cornwall, together with the coinage of the said stannary, and all issues and profits thereof arising; and also the explees, profits, and perquisites of the court of stannary, and the mines of the said county, (except only 1000 marks, which to Our beloved and faithful William de Monte-Acuto, Earl of Salisbury, We have granted, for Us and Our heirs, to be taken to him, and the heirs male of his body lawfully begotten, of the issues and profits of the aforesaid coinage, until there should come to his or their hands the castle and manor of Tonbridge, with the appurtenances in the county of Wilts, and the manors of Aldeburn, Ambresbury, and Winterbourn, with the appurtenances in the said county, and the manor of Caneford, with the appurtenances in the county of Dorset, and the manors of Henstrig and Charleton, with the appurtenances in the county of Somerset, which Our beloved and faithful John de Warren, Earl of Surrey, and Joan his wife, hold for the term of their lives, and which after their deaths to Us and Our heirs ought to revert, the remainder whereof We have granted, after the decease of the said Earl and Joan, to the aforesaid Earl of Salisbury and the heirs male of his body lawfully begotten, to the value of 800 marks by the year, and also of lands and rents of the value of 200 marks, which to the said Earl of Salisbury to have in form aforesaid, we granted to provide; and also our stannary in the aforesaid county of Devon, with the coinage and all issues and profits of the same, and the issues, profits, and perquisites of the said court of stannary, and the water of Dartmouth in the said county, and the yearly farm of £20 of Our city of Exeter, and Our prize and customs of wines, in the water of Sutton in the said county of Devon, as also the castle of Walyngford, with its hamlets and members, and the yearly farm of the town of Walyng-

(a) Roger de Okebeare held  $\frac{1}{4}$  of this manor, 3 Edw. II., 1 Calend. Inq. post mortem, 257. And see Madox, Baron. 183. Mad. Exch. 434.

(b) Held 33 Edw. I. by Nicholas de Trenoda, ib. 198; 17 Edw. II. by John Cut de Pernec, ib. 307; 18 Edw. II. by Nicholas de Trenoda, ib. 320.

(c) The sheriff of Cornwall accounted in the Exchequer de xxvi. xiiis. et iiid. de wrecco navis quæ periclitata est in Insulâ de Sullia. In thesauro liberavit et quietus est. 33 H. 2, Rot. 11 b, Cornualia. Madox, Exch. 235.

ford, with the honours of Walyngford and Saint Vallery, with the appurtenances in the county of Oxford, and other counties wheresoever those honours may be, and the castle, manor, and town of Berkhamsted, with the park there, together with the honour of Berkhamsted in the counties of Hertford, Buckingham, and Northampton, and other their appurtenances, and the manor of Byffet with the park there, and other its appurtenances; in the County of Surry: To have and to hold to the said Duke and to the first begotten sons of him and his heirs Kings of England, being dukes of the said place and heirs apparent to the said kingdom of England (*a*); together with the knights' fees and advowsons of churches, abbeys, priories, hospitals, and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs (*b*), wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the aforesaid castles, boroughs, towns, manors, honors, stannaries and coinages, lands and tenements, howsoever and wheresoever belonging or appertaining, of Us and Our heirs for ever, together with 24*l.* of yearly farm, which Our beloved and faithful John de Meere to Us by the year for all his life is bound to pay for the castle and manor of Meere, with the appurtenances, in the county of Wilts, granted to him by Us for the term of his life, to be taken every year by the hands of the said John for the term of his life, and with the aforesaid 1000 marks yearly to the aforesaid Earl of Surrey of the issues of the coinage aforesaid by Us so granted after seisin obtained by him or his heirs males of his body begotten of the said castle and manor of Tunbridge, and the manors of Aldebourn, Ambresbury, Winterbourn, Caneford, Hengstrigg, and Carleton, after the deaths of the said Earl of Surrey and Joan, and of the lands and rents of the value of 200 marks to the said Earl of Salisbury and the heirs males of his body begotten, so to be provided as an equivalent for their portion (*c*) of the said castle, manor, land, and tenements, when they shall wholly or partially come to the hands of the said Earl of Salisbury or of the heirs males of his body. We have moreover granted for Us and Our heirs, and by this Our charter We have confirmed, That the castle and manor of Knaresburgh with the hamlets and members thereof and the honour of Knaresburgh, in the county of York, and other counties, wheresoever the same honour may be, the manor of Istilworth, with the appurtenances, in the county of Middlesex, which Philippa, Queen of England, Our most dear consort, holds for term of life, and the castle and manor of Lydeford(*d*), with the appurtenances and with the chase of Dertmore, with the appurtenances, in the said county of Devon, and the manor of Bradenesh,

(*a*) Habend' et tenend' eidem duci et ipsius et heredum suorum regum Anglie filiis primogenit' et dicti loci ducibus, in regno Anglie hereditar' successor'

(*b*) Liberis consuetudinibus.

(*c*) Pro ratâ portionis eorundem.

(*d*) *Ante*, 454. Henricus de la Pomeria debet v marcas, ne homines de Lideford habeant meliorem Libertatem quam homines Exoniæ. Mag. Rot. 9 Johann. rot. 18, b. *Devenescira*. Madox Exch. 282 (*t*).

with the appurtenances, in the same county, which Our beloved and faithful Hugh d'Audele, Earl of Gloucester, and Margaret his wife (a) hold for the life of the said Margaret; and the said castle and manor of Meere, with the appurtenances, which the aforesaid Joan so for life holdeth of Our grant, and which after the death of the said Queen, Margaret and John, to Us and Our heirs ought to revert, that is to say, after the decease of the said Queen, the castle and manor of Knaresburgh, with the honor, hamlets and members thereof aforesaid, and other its appurtenances, and the manor of Istilworth (b), with the appurtenances, and after the death of the said Margaret, the said castle and manor of Lydeford with the said chase of Dertmore and other its appurtenances, and the manor of Bradeneshe, with the appurtenances, and after the death of the said John, the said castle and manor of Meere, with the appurtenances, shall remain to the aforesaid duke and to the first begotten sons of him and his heirs, kings of England, being Dukes (c) of the said place and heirs apparent to the kingdom of England, as before is said: To have and to hold together with the said knights' fees, advowsons of churches, abbeyes, priories, hospitals, and chapels, with hundreds, wapentakes, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, services of tenants, as well free as villein, and all other things to the same castles, manors, and honours, howsoever and wheresoever belonging, or appertaining of Us likewise and Our heirs for ever, all which castles, boroughs, towns, manors, honor, stannaries, coinages, rents (firmas) of Exeter (d) and Wallingford, lands and tenements as above are specified, together with the fees, advowsons, and all other things aforesaid, to the aforesaid duchy, by Our present charter, for Us and Our heirs We do annex and unite to the same for ever to remain, so that from the said duchy at no time they be any ways severed nor to any person or persons other than dukes of the same place, by Us or Our heirs be given, or in any manner granted; so also, as that whenever the abovesaid duke or other dukes of the same place shall depart this life, and a son or sons to whom the said duchy, by virtue of Our grants aforesaid, is appointed to belong shall not then appear, the said duchy, with the castles, boroughs, towns, and all other the abovesaid to Us, Our heirs, kings of England, shall revert, to be retained in Our hands and in the hands of our heirs, kings of England, until such son or sons, being heir or heirs apparent (c) to the said kingdom of England, shall appear, as before is said, to whom then successively We, for Us and Our heirs, grant and will that the said duchy with the appurtenances be delivered, to hold, as above is expressed; We have moreover for Us and Our heirs granted, and by this Our charter confirmed, to the aforesaid duke, that the said duke and such first begotten sons of him and

(a) *Vide ante*, 337, 465.

(b) This manor was severed from the dukedom by Henry V. by whom in the ninth year of his reign it was granted (by act of parliament) "to the abbess and convent of Our monasterie of Saint Saviour and Seintz Marie the Virgine and Brigitte of Syon."

(c) *Ante*, 478 (a).

(d) *Vide ante* 478 (d).

of his heirs, dukes of the same place, shall for ever have free warren in all the demesne lands of the castles, lands, and other places aforesaid, so as the said lands be not within the bounds of Our forest; so that none enter into them to hunt in them or to take any thing which to warren appertaineth without the licence and will of the said duke or other dukes of the same place, under forfeiture to Us of 10*l*. Wherefore We will and firmly command for Us and Our heirs, that the said duke have and hold to him and the first begotten sons of him and his heirs kings of England, being Dukes of the same place and heirs apparent to the said kingdom of England (*a*), the said shrievalty of Cornwall, with the appurtenances, so that they and the other dukes aforesaid, at their wills make and constitute the sheriff of the said county of Cornwall, to do and execute the office of a sheriff there as hitherto (*b*) it used to be done, without the hindrance of Us or Our heirs for ever. Also the said castle, borough, manor, and honour of Launceston; castle and manor of Tremeton, with the town of Saltesh; castle, borough, and manor of Tyntagel; castle and manor of Rostormel, also the manors of Clymmesland, Tybeste, Tewynton, Helleston in Kerier, Moresk, Tewarnail, Pengkneth, Penlyn, Rellaton, Helleston in Trygshire, Lyskeret, Calistok, Talskydy, and the town of Lostwythiell, with the appurtenances, together with the park, bailiwick, bedelry, fisheries, and other things abovesaid, in the aforesaid county of Cornwall, and the aforesaid prisages, customs, and profits of ports aforesaid, together with the said wreck of the sea and the said profits and emoluments of the counties, hundreds, and courts to Us belonging, and the said stannary in the said county of Cornwall, together with the coinage of the said stannary, and with all issues and profits thereof arising, and also the explees, profits, and perquisites of the courts aforesaid (except only the said 1000 marks, which to Our well-beloved and faithful William de Monte-acuto, Earl of Salisbury, We granted, for Us and Our heirs to be taken to him and the heirs males of his body lawfully begotten, of the issues and profits of the coinage aforesaid, until to his or their hands the said castle and manor of Tonbrigg, with the appurtenances, and the said manors of Aldebourn, Ambresbury, and Winterbourn, with the appurtenances, and the said manor of Hengstrygg and Charlton, with the appurtenances, which the aforesaid Earl of Surry and Joan his wife hold for the term of their lives, and which after their deaths to Us and Our heirs ought to revert, the remainder whereof, after the deceases of the said Earl and Joan, We granted to the said Earl of Salisbury and the heirs males of his body lawfully begotten, to the value of 800 marks by the year, and the lands and rents of the value of 200 marks, which to the said Earl of Salisbury to have in form aforesaid We granted, shall come, as before is said;) and the said stannary in the county of Devon, with the coinage and all issues and profits thereof, and also the explees, profits, and perquisites of the court of the same stannary, the water of Dertmouth, and the said yearly farm of 20*l*. of the said city of Exeter, . . . the said prize and custom of wines in the

(*a*) *Ante*, 478'(*a*).(*b*) *Post*, 493.

water of Sutton, in the county of Devon, as also the aforesaid castle of Walyngford, with its hamlets and members, the yearly farm of the town of Walyngford, with the said honours of Walyngford and St. Valery, the castle, manor, and town of Berkhamsted, with the said honour of Berkhamsted, and the manor of Byflete, with its parks and other appurtenances as aforesaid, together with knights' fees, advowsons of churches, abbeys, priories, hospitals and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the said castles, boroughs, towns, manors, honours, stannaries and coinages, lands, and tenements, whatsoever and wheresoever, belonging or appertaining, of Us and Our heirs for ever, together with the said 24*l.* of annual farm which the aforesaid John de Meere to us yearly for his whole life is bound to pay for the said castle and manor of Meere, granted to him by Us to hold for the term of his life, to be taken yearly by the hands of the said John de Meere all his life, and also with the aforesaid 1000 annual marks to the aforesaid Earl of Salisbury of the profits of the coinage aforesaid by Us so granted, after seisin shall have been obtained by him or the heirs males of his body begotten, as well of the aforesaid manor of Tonbrigg and manors of Aldebourn, Ambresbury, Winterbourn, Caneford, Hengstrigg, and Charlton, after the decease of the said Earl of Surry and Joan, as also of the said land and rent of the value of 200 marks to the said Earl of Salisbury and the said heirs males of his body, so to be provided as an equivalent for their portion<sup>(a)</sup> of the said castle, manors, lands, and tenements, when the estate wholly or partially come to the hands of the said Earl of Salisbury, or the heirs males of his body lawfully begotten, as aforesaid; and that the aforesaid castle and manor of Knaresburgh, with its hamlets and members and with the honour of Knaresburgh and the manor of Istilworth, with the appurtenances, after the death of Our aforesaid consort; the castle and manor of Lydeford, with the appurtenances, and with the said chase of Dertmore, with the appurtenances, and the manor of Bradnesh, with the appurtenances, after the decease of the aforesaid Margaret; and the castle and manor of Meere, with their appurtenances, after the death of the aforesaid John de Meere, shall remain to the said duke, to have and to hold, to him and to the first begotten sons of him and his heirs, kings of England, being dukes of the same place, and heirs apparent to the said kingdom, together with knights' fees and advowsons of churches, abbeys, priories, hospitals, and chapels, and with hundreds, wapentakes, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the said castles, manors, and honours, howsoever and wheresoever belonging and appertaining, of Us likewise, and Our heirs for ever, as before is said. All which castles, boroughs, towns, manors, and honours, stannaries, and coinages, rents (firmas) of Exeter and Walyngford, lands and tenements,

(a) Pro ratâ portionis eorundem.



as above are specified, together with the knights' fees, advowsons, all other things above said, to the said duchy by this Our present charter, for Us and Our heirs, We do annex and unite to the same, to remain for ever, so as from the said duchy at no time hereafter they be severed, nor to any person or persons than the dukes of the same place by Us or Our heirs they be given, or in any ways granted, so, also, as that whenever the said duke, or other dukes of the same place, shall depart this life, and a son or sons to whom the said duchy by virtue of our said grants is appointed to belong, shall not then appear, the same duchy, with the castles, boroughs, towns, and all other things aforesaid, to Us, and Our heirs, kings of England, shall revert, to be retained in our hands, and in the hands of Our heirs, kings of England, until such son or sons, heir or heirs apparent to the said kingdom of England, shall appear, as before is said, to whom then successively, We, for Us and Our heirs, grant and will that the said duchy, with the appurtenances, be delivered to be holden, as above is expressed; and that the said duke, and the first begotten son of him and of his heirs, dukes of the said place, for ever, have free warren in all the demesne lands aforesaid, so that the same lands be not within the bounds of Our forest, so as that none enter into those lands to hunt in them, or to take any thing which to warren belongeth, without the licence and will of the said duke and the other dukes of the said place, under forfeiture to Us of £10, as before is said.

Witnesses, the venerable John, Archbishop of Canterbury, Primate of all England, Our chancellor; Henry, Bishop of Lincoln, Our treasurer; Richard, Bishop of Durham; John de Warren, Earl of Surrey; Thomas de Bello Campo, Earl of Warwick; Thomas Wake, of Lydell; and John de Mowbray; John Darcy, le Neveu, steward of Our household, and others. Given by Our hand, at Westminster, the 17th day of March, in the eleventh year of Our reign,

By the king himself and all the council in parliament (a).

*And after that, in the said parlement, by the assent and counsell foresaid, by his other letters patentes, beryng date the XVIIIth day of Marche than next followyng, made declarations, grauntes, ordynaunces, annexions, and confirmations, unto and for his said furst begoten sonne, accordyng to this tenoure here followyng:—*

Edward, by the grace of God, King of England, Lord of Ireland, and Duke of Aquitaine, to his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all his bailiffs, and lieges, greeting. Know, that whereas We lately willing to honour the person of Our faithful and beloved Edward, Earl of Chester, Our first begotten son, did, by the common assent and counsel of the prelates, earls, barons, and others of Our council, (being called together in Our present parliament at Westminster, on Monday next after the feast of St. Matthias the Apostle last past,) give to Our said son the name and honour of duke of Corn-

(a) This and the next charter being "Per ipsum regem et totum concilium in parlamento," have the effect of statutes, Vide 8 Co. Rep. 15; Farrar's case, cited Skinn. 78. The third charter (post 485) has not these words.

wall, and appointed him to be duke of Cornwall, and girded him with a sword, as it behoved; and that he the state and honour of a duke might be able to maintain in a manner becoming the nobility of his race, and to support his charges in that behalf, We did give and grant by Our charter, for Us and Our heirs, to Our said son, under the name and honour of duke of the said place, the shrievalty of Cornwall, with the appurtenances; also the castle, borough, manor, and honour, of Launceneton, with the parks there, and other its appurtenances in the counties of Cornwall and Devon; the castle and manor of Tremeton, with the town of Saltesh, and the park there, and other its appurtenances in the counties aforesaid; the castle, borough, and manor of Tyntagell, with the appurtenances in the said county of Cornwall; the castle and manor of Rostormell, with the park there, and other its appurtenances in the same county; also the manors of Clymmeslond, with the park of Kerribullok, and others its appurtenances, Tybest, with the bailiwick of Poudershire, and other its appurtenances, Tewynton, with the appurtenances, Helleston, in Kerrier, with the appurtenances, Moresk, with the appurtenances, Tewnnaill, with the appurtenances, Pengkneth, with the appurtenances, Penlyn, with the park there, and other its appurtenances, Rellaton, with the bedelry of Estwynelshire, and other its appurtenances, Helleston, in Tregshire, with the park of Hellesby, and other its appurtenances, Lyskeret, with the park there, and other its appurtenances, Calystok, with the fishery there, and other its appurtenances, Talskydy, with the appurtenances in the same county of Cornwall, and the town of Lostwithiel, in the same county, with the mills there, and other its appurtenances; and Our prize and customs of wines in the said county of Cornwall; also all profits of Our ports within the said county of Cornwall to Us belonging, together with wreck of the sea, as well of whale and sturgeon and other fishes, which belong to Us by reason of Our prerogative, as also of all other things to wreck of the sea in what manner soever belonging, in all the aforesaid county of Cornwall; also the profits and emoluments to Us belonging of county courts (*comitatum*) held in the said county of Cornwall, and of hundreds and hundred courts in that county; also Our stannary in the said county of Cornwall, and together with the coinage of the said stannary, and with all issues and profits arising therefrom, and the explees, profits, and perquisites of courts of stannary and mines in the said county, except only 1000 marks, which We had granted to Our faithful and beloved William de Monte-Acuto, Earl of Sarum, to be received by him and his heirs males of his body lawfully begotten; of the issues and profits of the coinage aforesaid in a certain form, more fully described in Our other charter, to the said duke thereof made, to have and to hold to the said duke, and to the first begotten sons of himself and of his heirs, Kings of England, being dukes of the said place and heirs apparent (a) to the said kingdom of England, together with knights' fees and advowsons of churches, abbeys, priories, hospitals, and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats and services of tenants, as well free as

(a) *Ante*, 478 (a).

villein, and all other things to the said castles, towns, manors, honors, stannaries, coinages, lands, and tenements, howsoever and wheresoever belonging or appertaining, together with certain other manors, lands, and tenements, in divers other counties of Our kingdom, of Us and Our heirs for ever, as in the said other charter is more fully contained: We, willing to do more ample favor to the said duke in this behalf for the support of such honour, have granted for Us and Our heirs, that the said duke, and the first begotten sons of him and his heirs kings of England being dukes of the same place, and heirs apparent to the said kingdom of England, do for ever have the return of all writs of Us and Our heirs, and of summonses of the Exchequer of Us and Our heirs, and attachments, as well in pleas of the crown as in all others, in all his said lands and tenements in the said county of Cornwall, so that no sheriff or other bailiff or minister of Us or Our heirs enter those lands, or tenements, or fees to execute the said writs and summonses, or attachments, as well in pleas of the crown as in the others aforesaid, or do any other official act (*officium*) there, except in default of the said duke and other dukes of the said place, and his and their bailiffs or ministers in his and their lands, tenements, and fees aforesaid; And also that they have the chattels of their men and tenants in all the county aforesaid, being felons and fugitives, so that if any of their same men or tenants ought for his offence to lose life or limb, or shall flee and refuse to stand to justice (*judicio stare noluerit*), or shall commit any other offence for which he ought to lose his chattels, wheresoever justice ought to be done upon him, whether in the court of Us or Our heirs or in any other court, the said chattels shall belong to the said duke and the said other dukes aforesaid, and that it be lawful to them and their ministers, without hindrance of Us and of Our heirs and of others Our bailiffs or ministers whatsoever, to put themselves in seisin of the chattels aforesaid, and to retain them to the use of the said duke and of the other dukes; and also that they for ever have all fines for trespasses and other offences whatsoever, and also fines *pro licentiâ concordandi*, and all amerciaments, ransoms, issues forfeited, and forfeitures, year day and waste and strip, also the things which to Us and Our heirs may belong of such year day and waste, and of murders (*a*), from all the men and tenants of their said lands, tenements, and fees in the said county of Cornwall, in whatsoever court of Us and of Our heirs it shall happen that these men and tenants are, which before us and Our heirs, and in the chancery of Us and Our heirs, and before the treasurer and barons of Us and Our heirs of the Exchequer, and before the justices of Us and Our heirs of the Bench, and before the steward and marshal and clerk of the market of the household (*hospitii*) of Us and Our heirs, for the time being, and in all other the courts of Us and Our heirs, as also before justices itinerant for common pleas and pleas of the forest, and any other justices of Us and Our heirs, as well in the presence as in the absence of Us and Our heirs, make fines or be amerced,

(a) *Murdia*, i. e. amercements for murder. Bro. *Quo Warranto*, pl. 2.

forfeit issues, or that forfeitures and murders shall be adjudged against them; which fines, amerciements, ransoms, issues, day year and waste or strip, forfeitures and murders to Us and Our heirs would belong if they had not been granted to the said duke and the other dukes aforesaid; so that the same duke and other dukes aforesaid, by themselves or by their bailiffs or ministers, may levy, perceive, and have such fines, amerciements, ransoms, issues and forfeitures of their men and tenants aforesaid, and all things which to Us and Our heirs might belong of the day year and waste or strip, and murders aforesaid, without question or hindrance from Us and Our heirs, justices, escheators, sheriffs, coroners, and other bailiffs, or ministers whatsoever. Wherefore We will and firmly command for Us and Our heirs, that the said duke and the other dukes of the said place for the time being do for ever have the said liberties as is aforesaid, and do henceforward fully enjoy and use the same.

Witnesses, the venerable Fathers, John, Archbishop of Canterbury, Primate of all England, Our Chancellor; Henry, Bishop of Lincoln, Our treasurer; Roger, Bishop of Coventry and Lichfield; Thomas, Earl of Norfolk and Marshal of England; Our most dear uncles, Richard, Earl of Arundel, and Thomas, Earl of Warr; Thomas Wake, of Lydell; John de Mowbray; John Darcey, le Neveu, Steward of our Household, and others. Given by Our hand at Westminster, the XVIIIth day of March, in the eleventh year of Our reign.

By the King himself and all the council in parliament.

*And after that by his other letters patentes, (a) beryng date the IIII<sup>de</sup> day of Januarie the same yeare (b), made also grauntes, ordinaunces, annexions and confirmations unto and for his said fursatogoten sonne, accordyng to this tenour here folowyng :*

Edward, by the grace of God, King of England, Lord of Ireland, and Duke of Aquitaine, to his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all his bailiffs and lieges, greeting. Know, that whereas We lately willing to honour the person of Our faithful and beloved Edward, Earl of Chester, Our first begotten son, did give to Our said son the name and honour of duke of Cornwall, and appointed him to be duke of Cornwall, and girded him with a sword, as it behoved, and that he the state and honour of a duke might be able to maintain in a manner becoming the nobility of his race, and support his charges attaching to such high honor, did give and grant by Our charter, for Us and Our heirs, to Our said son the shrievalty of Cornwall, with the appurtenances, also the castle, borough, manor and honor of Launceneton and divers other castles, boroughs, towns, manors, and honours, in the same county and elsewhere: To have and to hold to the said duke and the eldest sons of him and his heirs kings of England, being dukes of the same place and heirs apparent to the said kingdom of England, together with the knights' fees, advowsons of churches, and all other things to the said castles, boroughs, towns, manors, and honours in

(a) Not in parliament, as the two preceding charters.

(b) This king's reign having begun on the twenty-fifth of January.

any wise belonging, from Us and Our heirs for ever, as in Our charter thereof to the said duke made is more fully contained, We, willing to provide more abundantly for Our said son, have given and granted for Us and Our heirs, and by this Our charter have confirmed to the said duke all Our fees, with the appurtenances which We have in the said county of Cornwall, or which do or shall (poterunt) belong or appertain to Us; To have and to hold to the said duke and the first begotten sons of him and of his heirs, kings of England, being dukes of the said place and heirs apparent to the said kingdom of England as aforesaid (a), together with wards, marriages, reliefs, escheats, forfeitures, and all other profits, issues, and emoluments which belong or shall belong to Us by reason of those fees, or which We and Our heirs might perceive and have if we had retained these fees in Our hands, from all and singular as well those who now hold the fees so by Us given and granted with the said county of Cornwall and those who shall hereafter hold the same, as also from the tenants holding of those fees, when they shall happen, notwithstanding Our prerogative in that behalf, and notwithstanding that the tenants who hold those fees or the tenants who hold of those fees may hold of Us or of Our heirs of Our crown or otherwise, in chief or in any other manner without the said county or within, of Us and Our heirs for ever. Which fees, with the appurtenances and all other things aforesaid, as they are above specified, We for Us and Our heirs annex to the said duchy and unite so to remain for ever in the same manner as the said castle, boroughs, towns, manors, and honours are annexed to the same, so that the same be in no wise severed from the said duchy at any time nor be given or in any wise granted by Us or Our heirs to any other person or persons than to the said dukes of the said place. And moreover We have granted of Our more abundant grace to the said Duke, for Us and Our heirs, that he and the first-begotten sons of him and his heirs kings of England, being dukes of the same place and heirs apparent (a) to the said kingdom of England, do for ever have the returns of all writs of Us and Our heirs, and of summonses of the Exchequer of Us and Our heirs, and attachments, as well in pleas of the Crown as in all others, as well in the same fees, as also in other fees which are held of the same in the said county of Cornwall; so that no sheriff, or other bailiff or minister of Us or Our heirs enter those fees to execute the said writs and summonses or to make attachments, as well in pleas of the Crown as in the others aforesaid, or do any other official act (*officium*) there, except in default of the said Duke and other Dukes of the said place, and his and their bailiff and minister aforesaid; and also that they have the chattels of the tenants holding the fees, and also of the tenants holding of their fees in the county aforesaid, being felons and fugitives, so that if any of the same tenants ought for his offence to lose life or limb, or shall flee and refuse to stand to justice (*judicio stare noluerit*), or shall commit any other offence for which he ought to lose his chattels, wheresoever justice ought to be done upon him, whether in the Court of Us or Our heirs, or in any other court, the said chattels shall belong

(a) *Vide ante*, 478 (a).

to the said Duke and the other Dukes aforesaid, and that it be lawful for them and their ministers, without hindrance of Us or of Our heirs or of other Our bailiffs or ministers whatsoever, to put themselves in seisin of the chattels aforesaid, and to retain them to the use of the said Duke and of the said other Dukes; and also that they for ever have all fines for trespasses and other offences whatsoever, and also fines *pro licentiâ concordandi*, and all amerciaments, ransoms, issues forfeited and forfeitures, year day, and waste and strip, and all things which to Us and Our heirs may belong of the said year day and waste and likewise of murders (*a*) from all tenants holding their fees, and holding of their fees, in the said county, in whatsoever court of Us and of Our heirs it shall happen that these tenants, as well before Us and Our heirs and in the Chancery of Us and our heirs and before the Treasurer and Barons of Us and Our heirs of the Exchequer, and before the Justices of Us and Our heirs of the Bench, and before the steward and marshal and clerk of the market of the household of Us and Our heirs for the time being, and in all other the courts of Us and Our heirs, as also before justices itinerant for common pleas and pleas of the forest, and any other justices and ministers of Us and Our heirs, as well in the presence as in the absence of Us and Our heirs, make fines, or be amerced, forfeit issues, or that forfeitures and murder shall be adjudged against them, which fines, amerciaments, ransoms, issues, year day and waste or strip, forfeitures and murders, to Us and Our heirs would belong if they had not been granted to the said Duke and the other Dukes aforesaid, so that the same Duke and other Dukes aforesaid by themselves, or by their bailiffs and ministers may levy, perceive, and have such fines, amerciaments, issues, and forfeitures of such tenants, and all things which to Us and Our heirs might belong of the said year, day, and waste or strip and murders (*a*), without question or hindrance from Us and Our heirs, justices, escheators, sheriffs, coroners, and other bailiffs or ministers whatsoever: Also We have granted to the said Duke for Us and Our heirs, and by the charter have confirmed, that he and the first-begotten sons as aforesaid of him and his heirs, Kings of England, being Dukes of the same place and heirs apparent (*b*) to the said kingdom of England, do have and hold all fees to the aforesaid castles, boroughs, towns, manors and honours, and other lands and tenements, whatsoever, which we gave to the said Duke by another charter, and caused to be annexed and united to the said duchy, in the said county of Cornwall, in any wise belonging, together with wards, marriages, reliefs, escheats, forfeitures, and other profits, issues, and emoluments whatsoever, which belong or shall belong to Us by reason of those fees in the same county, or which We or Our heirs might and ought to perceive and have if the said fees had been retained in the hands of Us and Our heirs, as well from all and singular the tenants who now hold or who hereafter shall hold the said fees as from the tenants holding of the said fees within the said county whenever the same shall happen, notwithstanding Our prerogative, or that the tenants holding the said fees, or the

(*a*) *Vide ante* 484, n.(*b*) *Ante*, 478 (*a*).

tenants holding of the said fees may hold elsewhere of Us and of Our heirs, or of the crown or otherwise in chief, or in any other manner, without the said county or within (a). We have granted also to the said Duke for us and our heirs, that he perceive and have scutage and profit of scutage as well of the fees aforesaid as also of all other fees belonging to the said castles, manors, honors, lands and tenements which We have lately granted to the said Duke as being annexed and united to the said dukedom, as well without as within the said county of Cornwall, and also of the knights' fees belonging to the earldom of Chester within our said kingdom of England, viz. 40 shillings de scuto, or more or less, as it should happen, that We or Our heirs levied and had de scuto as well of the first year of our reign, and of any other time since we took upon ourselves the government of Our kingdom as also in times future whilst he shall hold the said duchy, notwithstanding the said fees in the said first year or since have been in Our hands or in the hands of others, so as that We ought to have the scutage thereof, and notwithstanding that the said Duke may not hitherto have had or in future have his service in our wars of Scotland or elsewhere by reason of which service he ought to receive such scutage. Wherefore we will and firmly command for Us and Our heirs, that the said Duke and other dukes of that place for the time being for ever have the fees aforesaid with the appurtenances and all other profits aforesaid, and also the liberties aforesaid, and that they henceforth fully enjoy and use the said liberties and every of them, and that the said Duke as well in the said past time as henceforward as long as he shall hold the said duchy, do have and receive the scutage aforesaid and the profit thereof, is as aforesaid.

Witnesses, the venerable Fathers J. Archbishop of Canterbury, Primate of all England; R. Bishop of Coventry and Lichfield; R. Bishop of Chichester, Our Chancellor; Hugh de Courteney, Earl of Devon; Henry de Beaumont, Earl of Boghan; William de Clynton, Earl of Huntingdon; William de Ros de Hamelak, Henry de Ferrar John Darcy, steward of Our household, and others.

Given by Our hand at the Tower of London, the third day of January, in the 11th year of Our reign.

(b) By force of which grauntes, ordinances, annexions and confirmations, the said Edward then Duke of Cornewaill, as Duke of Cornewaill, was seised of all the seid duchie and counte, castell, mauers, honoures, parkes, borowghes, baillifwyks, bedelaries, fysshings, tounes, milles, prises and custumes of wyne, profitts of portes and havenes, wrekkys, profitts of shires, hundreds and courtes, stannarie with cunage of the same, perquisits of the courts of the mynere and stannar', with warden, with franchises, libertees, and all maner profitts and possessions comprised in the said letters patentes and tenures of the same.

And the moost victorious Prince your Fader, the furstbegoten soune of Kyng Herry the myth, as Duke of Cornewaill, had the

(a) *Vide ante.*

(b) What follows is in English upon the parliament roll, except those parts which are printed in French, and the parts in italics which are in Latin.

said duchie and counte, and all the said castelles, maners, honoures, parkes, burghes, baillefwykes, bedlaries, fysshynge, townes, milles, prises and custumes of wyues, profitts of portes and havens, wrekkis, profitts of shires, hundreds and courts, stannarie with cunage of the same, perquisitis of the court of the mynere and stannarie, with wares, with franchises, libertees, and almaner profitts and possessions comprised in the said letters patentez and tenoures of the same.

And the said Edward sometyme Duke of Cornwall, and the said victorious prince your fader, in the lyf of your said noble aill, as Duke of Cornewall, used to have and had amongs other as parcell of the said duchie, fynes for alienations of all londes, tenementes and possessions, holden of theym in chief within the said countee; and the first seisine of all londes and tenementes, of every tenaunt that held of them in chief within the said counte, after thair decease, and th'issnez therof token to their owen use; unto the tyme that they that right had to the same londes and tenementes, sued and had lyvere therof out of the said dukes handes, as they shuld have doon oute of the kynges handes, yf they had holden theym of the kyng in chief, and in lyke forme as your true liegemen doon and owen to doo within COUNT PALATYNE, (a) notwithstanding that thoo tenauntez held in other places of the kyng in chief (b).

And where in your parlement begonne and holden at Westm', the ix day of Julie, the yere of your full noble reigne xxxiii, and unto the xiiij day of November than next folowynge proroged(c): It lyked your highnes, considering that your said firstbegoten sonne the tyme of his birth was Duke of Cornewall, and ought of right to have lyvere of the said duchie, and of all honoures, lordships, seignories, castels, maners, londes, tenementes, rentes, possessions and enheritaunces with their appurtenaunce, to the said duchie belongynge, or parcell of the same in any wise; by th'advys, assent and auctorite of your said parlement, the said xii day of Novembre, delyvered and did to be delyvered to the said prince your said firstbegoten sonne, the said duchie of Cornewall, and all honoures, lordships, seignories, castels, maners, londes, tenementes, rentes, reversions, fermes, fee fermes, knyghtes fees, advousons of chirches, chapels, and all other benefices, hospitals, chaunteries, with almaner libertees, franchises, offices, courtes, vieus of francplegg, wayfes, strays, forfeitures, wrekkis of the see, prises of wyne, custumes, havenarie tolles, cunage of tynne, stannaries, marketts, faires, with all other things, possessions and enheritaunce, profitez and commoditees, with their appurtenaunce, to the said duchie annexed, unyed, perteynyng or belongynge, or parcell of the same in any wise. And that the said Prynce shuld have, enjoye and possede all the premisses, as largely, frely and entirely, and in as ample fourme, as Prince Edward, sonne of Kyng Edward the iii, your full noble progenitour, or the moost noble Cristen victorious Prynce Kyng Henry the vi your fader, aye to your said besecher, ever had, enjoyed or possessed afore this tyme, as dukes of Cornewall, the premisses, or

(a) *Vide ante*, 255, (d).  
(c) *Vide* 5 Rot. Parl. 293.

(b) *Vide ante*, 221, 254.



eny parcell thereof: and that your said besecher nowe prince, shuld have, entre, occupie and enjoye the same, from the seid xiith day, to hym in lyke forme, estate and enheritaunce, as the seid Edward, furstbegoten sonne of Kyng Edward the iiiide, youre progenitour, had and enjoyed the same, with certayn provisions, restrayntes and exceptiones, as in the act of the said lyverre made in youre said parlement more plainly it apperith. By which provisions, restrayntes and exceptions, the said duchie is gretely dismembered, dyminuted and annyntised, to the disheritaunce of your said besecher, and ayenst youre lawes afore tymes provided and made of the said duchie.

Please it youre moost noble grace to consider the premisses, and howe that youre said moost humble furstbegoten sonne, is and was the tyme of his birth, by the cours of your lawes Duke of Cornewaill, and oweth of right to have had the said duchie, and all honoures, lordships, maners, londes, tenementes, rentes, possessions and enheritaunces, with their appurtenaunce, to the said duchie belongyng, or parcell of the same in eny wise; and theruppon to ordeyne and establissh by y'assent and advis of the lordes spirituelx and temporels in this your parlement and by th'auctorite of the same parlement, that the seid prynce your said furstbegoten sonne, may have and enjoye the said duchie, and all thynges comprised and specified in the said letters patentes, and tenours of the same, and all thyngs to the said duchie of later tyme by sufficient auctorite annexed, with all other possessions, libertees, fraunchises and commoditees, as largely, frely and entierly, and in as ample forme, and in lyke estate and enheritaunce, as the forsayd Prynce Edward, sonne of Kyng Edward the iii<sup>de</sup>, youre full noble progenitour, or the said noble victorious prynce your fadre, ever had, enjoyed or posseded the same afore this tyme, as dukes of Cornewaill; the said provisions, restrayntes and exceptions, or eny of theym, notwithstandyng.

Provided alwey, that the seid ordynauce and establisshment extend not nor be prejudiciall in eny wise to eny londes, tenementes, or other of thise premisses, dissevered, disannexed or disunyed from the said duchie; nor to eny persone or persones, havyng estate or possession of or in eny of the said londes, tenementes and other premisses, for the which eny other londes, tenementes or possessions, beyng of the yerely value of the said londes and tenementes, and other premisses, so dissevered, disannexed or disunyed from the said duchie, have been afore this tyme by sufficient auctorite annexed or unyed to the same duchie from evermore, in recompence for the same londes, tenementes and other premisses, so dissevered, disannexed and disunyed from the said duchie.

Provided also, that this acte and ordinaunce extend not to the castell, manoure and honoure of Knaresburgh, nor to the membres and other appurtenaunce to the same, in the which certayn persones been enfeofed to youre use, to that entent to performe yerof youre wille.

*Also four schedules were exhibited to the lord the king in the said parliament, and by the command of the same lord the king annexed to the said petition, in these words:—*

Provided alwey, that this acte, or any other acte made or to be made in this present parlement, extend not nor in any wise be prejudiciall unto the provost and scolers of oure College Roiall of oure Lady and Seint Nicholas of Cambrigge, and their successours; nor to the provost and College Roiall of oure Lady of Eton beside Wyndesore, in the counte of Buk, and their successours, in or of any graunte or grauntes, confirmation or confirmations, relesse or relessez, acte of parlement or actes of parlements, of any landes and tenementes, rentes, reversiones, services, possessions spiritueltx or temporeltx with their appurtenaunce, pensions, portions, apportes, fermes or annuitees, or of any advousons or patronages, or in or of any privileges, libertees, immunities and fraunchises, by us, or any other persone or persones, or body incorporate, to the said provost and scholers and their successours, or to the said provost and college and their successours, or to any of their predecessours and their successours, before this tyme made. But that all such grauntes, confirmations, relesses, actes of parlement, and every of theym, and all letters patentes and other writyngs yer-upon made, be good and effectuell unto theym and their successours, and unto eyther theym and their successours, after the purportes and tenours of the same.

Savyng alwey to Richard Wydevyll Lord Ryvers, and Jaquet his wyf Duchesse of Bedford (a), all such annuitees as to theym belongeth oute of the said duchie of Cornewaill, unto the tyme that the seid Richard or duchesse be dewly recompensed, or due recompence offered unto theym for their said annuitees, by the kyng, by th'advys and assent of his counseill.

Savyng also unto Robert Shotesbroke Knyght, all such annuitees as to theym belongeth oute of the seid duchie of Cornewaill, to the tyme that the seid Robert be dewly recompensed, or dewe recompence offered unto hym for his said annuite, by the kyng, by th'advys and assent of his counseill. And the kyng wolle by auctorite aforesaid, that the Chaunceller of Englund for the tyme beyng, have full power and auctorite, to do make oute sufficiant letters patentes unto the said Richard, duchesse, and Robert, upon the said recompenses.

Moreover, where that by auctorite of the parlement holden at Westm', the xii day of Novembre, the yere of the reigne of oure soverayn lord the kyng xxxiiii<sup>th</sup> (b), the seid prince shuld be in sojorne with the kyng, and the kyng charged with his dietts; that by th'auctorite of this present parlement, in consideration that the kyng hath made lyverey unto the seid prynce of the duchie of Cornewaill, by th'auctorite of the same parlement, that the kyng be discharged of the diettes and sojorne of the seid prince, and that the seid prynce be at his owne charge; and that all other thyng that apperteyneth unto hym, be under such conduyt as hath be appoynted by the king afore this tyme.

Provided alwey, that this present acte extend not nor be prejudiciall unto any persone or persones, havynge any office or offices by the kynges graunt by his letters patentes, within the duchie of Cornewaill, or apperteynyng or beyng membre of the same duchie; the which persone or persones were with the kyng or the prince

(a) Mann. Exch. Pract. 2d ed. 393, (l).

(b) Rot. Parl. 293.

at Bloreheth, or at Ludford, or at eny of thes felde, or in this jorney; nor to the wages, fees, profites and commoditees, of old tyme due and accustomed to the same office or offices, not to eny parcell therof.

*Which petition and schedule were brought and delivered to the Commons of the Kingdom of England in the same parliament; whereunto the commons gave their assent in this form:*

A cest bille, et a les cedulaes a ycest bille annexez, les Commyns sont assentuz.

*Which petition, schedule and assent being in this parliament read, heard, and fully understood, by the advice and assent of the lords spiritual and temporal being in the same parliament, it was answered to the same in form following:*

Soit fait come il est desire: saufes au roy certeyns choses, en manere et fourme ensuantz.

Alwey forseyn, that all avoidaunces of bisshopriches, dignitees, and grete offices, perteynyng to the said principaltee and duchie, be and stond at oure will, nomination, gifte and graunte, this acte notwithstanding.

Provided alwey, that eny acte made in this oure present parlement, begon and holden at Coventre, the xx<sup>th</sup> day of Novembre, the yere of oure reigne xxxviii<sup>th</sup>, extend not nor be in eny wise prejudiciall or hurte to Margarete Quene of Englonde, oure moost entierly beloved wyfe.

Provided alwey and except, that this acte, neither noon other acte made in the present parlement, extend not ne be prejudiciall unto to Jaspas Erle of Pembroke, neither to Herry Erle of Ruchemond, sonne and heire to Edmund late Erle of Ruchemond, of or to any gyft or giftes, graunte or grauntez, made unto the seid late Edmund and Jaspas, by us, oure letters patentes, act or acts of parlement, severally or joyntly, by whatsoever name or names the seid Jaspas, or elles the seid late Edmund, be had, nammed or called in the same.

Provided alwey, that this acte, nor noon other acte made in this present parlement, extend not nor in eny wise be prejudiciall unto the wardeyn and scolers of the college called Merton Halle in Oxford, in or of any graunte to theym and their successours made, of the manoir of Stratton Margret in Wiltshire, with their appurtenaunce; or in or of an cs., to be yerely paid oute of the manoir of Warplesden in the counte of Surr, by the handes of the fermours and occupiers there; which the seid wardeyn and scolers have, in recompense for certeyn londes and tenementes in the counte of Cambrigg, nowe apperteynyng to the provost and scolar of youre College Roiall of oure Lady and Seint Nicholas of Cambrigg.

Provided alweyes, that this acte extend not nor be in any wise hurt nor prejudiciall to any persone or persones that nowe be, or hath been afore this tyme, manyall servaunt or servantez in oure houshold, which hath not been ayentst us in any field afore this tyme, except the Duchesse of Suff', and the Duc of Suff'; so that John Brekenoke, resceyvour generall of the duchie of Cornewail, fynde sufficient suerte of his good aberyng in his office, to oure firstbegoten sonne Edward Prince of Wales, betwene this and Estre next comyng (5 Rot. Parl. 356.)

## APPENDIX E.

*Charter to Tinnars 3 Johann.*

AMONG the Records of the Court of Chancery, preserved in the Tower of London, namely, Cart. Antiq. K. No. 5, is thus contained :

" John, by the grace of God, King of England, &c., know ye that we have granted that all our tinnars in Cornwall and Devonshire be free and quit of pleas of natives, whilst they work to the advantages of our farm or for the increase of our new rent of marks, because the stannaries are our demesnes; and that they may at all times freely and quietly, without the disturbance of any man, dig tin and turves to melt the tin any where in the moors, and in the fees of bishops, abbots, earls, as they have used and been accustomed, and to buy wood for the melting of tin without waste in the regards of forests, and to divert waters for their works in the stannaries, as by ancient custom they have used, and that they shall not depart from their works, for the summons of any one, unless for the summons of the chief warden of the stannaries, or his bailiff, We have granted also, that the chief warden of the stannaries, and the bailiffs for him, shall have over the aforesaid tinnars full power to judge and to do right to them, and that from them they shall be received into our prisons, if it shall happen that any of the aforesaid tinnars ought to be taken and imprisoned for any offence.

" And if it shall happen that any of them shall be a fugitive or outlaw, that their chattels shall be rendered to Us by the hands of the warden of Our stannaries, because the tinnars are Our farmers, and always in Our debt. Moreover We have granted to Our treasurers and weighers, that they may be more faithful and attentive to our interest in the receipt and custody of our treasures in the market towns, that they shall be quit in the towns where they abide of aids and tallages whilst they shall be in our service, because our treasurers and weighers have not any thing, nor can have any thing by the year for our aforesaid service.

" Witness, William, Earl of Salisbury, Peter de Stokes, Warin Fitz Gerold. Given by the hands of S. Archdeacon of Wells, at Bonne Ville upon Toke, the nineteenth day of October, in the third year of our reign."

*Disafforesting of Cornwall, 6 Johann.*

The following record is found in the great roll of the Exchequer in the sixth year of this king's reign.

" The men of Cornwall render account of 2000 marks and 200 marks for twenty palfreys, a palfrey being computed at ten marks, for disafforesting all Cornwall, and for other things which are contained in the charter thereof to them made; that they be therefore quit of all past pleas and attachments of forest and foresters, and that they may have sheriffs of their own, so that they may choose from the

best of their county, and may present them to the king, who may choose from those presented whom he will; and that he be sheriff as well as he should well serve, and if he serve not well let him be amoved, and let another be substituted instead of him by the king, of the same county, if one fit be found in the same county; and if such be not there found, the king shall give them from elsewhere a sheriff, such as shall not hate them, and shall treat them well. And for amoving the moteier (pro amovendo le moteier) which they were accustomed to use in their pleas, as it is contained in the charter of the king, which they have thereof. Terms, into the Exchequer of Easter, in the sixth year, 200 marks; at the feast of St. Michael, 250 marks; and so from Exchequer to Exchequer, until 2000 marks be paid, which being paid they will render at the two next Exchequers 200 marks for the palfreys.

"In the treasury £320. And they owe £1033. 6s. 8d., and 200 marks for the palfreys."

Mag. Rot. 6 J. rot. 4. a. *Cornewallia*, Madox, Exc. 279 (t).  
Ibid. 283 (l).

## APPENDIX F.

*Grant of Pardon and Immunities to the Tanners, Bounders, and Possessors of Works of Tin. Anno 23 Hen. VII. (1508.)*

THE KING to all to whom these presents, &c., greeting. Know ye that of Our special grace, certain knowledge, and mere motive, we have pardoned, remised, and released, and by these presents do pardon, remise, and release unto Robert Willoughby, Lord Brooke, John Moune, of, &c. [then follow about 1,500 other names], and to every of them, called tanners, bounders, or possessors of works of tin, who had not introduced the names of new possessors of any tin-work newly bounded, with the names of the works, in the next Court of Stannaries, showing the names of the possessors of the same works of tin, with the metes and bounds of the said works, as well in length as in breadth; to the possessors of any houses called blowing houses, in the county of Cornwall, who had not introduced the number of all and singular the pieces of tin in the Exchequer at Lostwithiel, at the time of every coinage, with the names of the possessors of the same houses, with the names of all the blowers or workers of the same pieces of tin blown or wrought in the same houses at the time of the coinage there; to the tanners, buyers of black or white tin; and to the makers of white tin who have not introduced the marks of the possessors of the said tin in the Exchequer at Lostwithiel, to be impressed, put, or written in a certain book of signatures or marks, being in the said Exchequer before the same possessors shall sign the said tin with the said mark; to the tanners or buyers of black or white tin; to the changers of the marks of any possessors so impressed, put or written in the said book of marks being in the said Exchequer; to the tanners or

buyers of black tin; to the blowers or workers of false or hard tin, as well with the letter H. as without the letter H.; and to the blowers or workers of white tin from their own black tin; all trespasses, contempts, impeachments, forfeitures, concealments, fines, pains, imprisonments, amerciaments, debts, or losses adjudged or to be adjudged against the form of any statutes, provisions, restrictions, or proclamations." And in another part, "that no statutes, acts, ordinances, provisions, restrictions, proclamations thereafter issuing, be made within the county aforesaid, nor without, to the prejudice, or in exoneration, of the same tanners, workers of black and white tin, buyers or vendors of black or white tin, and of other occupiers whatsoever of a work of tin, or of any person or persons whatsoever meddling with any black or white tin in the county aforesaid, their heirs or successors, unless there be first thereunto called twenty-four good and lawful men from the four stannaries within the county of Cornwall, that is to say, six men from every stannary, to be elected and named in form following, i. e. by the mayor of the borough of Truro, and the council of the said borough, six good and lawful men of the Stannary of Tywernhaile; by the mayor of the borough of Lostwithiel, (z) and the council of the said borough, six good and lawful men of the Stannary of Blackmore; by the mayor of the borough of Launceston, and the council, &c.,—six of the stannary of Penwith in Kerier (a), whensoever, how often soever, and wheresoever any statute, ordinance, provision, or proclamation be made by Us or Our council, or by Our heirs and successors, or by the Duke of Cornwall, by his council, or by the council of any of them, or by his command, so that no statute, &c. hereafter to be made by Us, Our heirs or successors, or by the aforesaid Duke of Cornwall for the time being, or by Our council, or the council of Our said heirs and successors, or of the said prince, be made unless with the assent and consent of the said twenty-four men so to be elected and named as aforesaid.

And the parties aforesaid, their heirs, &c., shall not be hereafter otherwise charged, &c. towards Us, Our heirs or successors, with any customs, subsidies, or licences of any tin going out of this Our kingdom of England, unless only as other merchants in the same county may be charged, &c. towards Us, or have been towards Our progenitors, in time of which memory is not, within Our ports of London and Southampton, for any customs, subsidies, or licences of tin going out of this Our kingdom of England; but We will, &c., that the aforesaid Robert, John, &c., and every of them, merchants of tin, and all other buyers, vendors, &c., shall be exonerated, &c., by these presents, from all new impositions, &c., so that the said Robert, John, &c., shall not hereafter be charged in any manner for any customs, &c. of tin going out of this Our kingdom of England, unless as other

(z) At Lostwithiel is the prison of the stannary courts. *Camd. Britann.* 8. It is within the assessionable manor of Restormel, *ante*, 476.

(a) The appointment of six by the mayor and council of *Helston* appears to have been omitted in the copy produced.

native buyers, vendors, and merchants are charged, or any native merchant is or hath been charged towards Us and Our progenitors within Our said ports of London and Southampton aforesaid; and further, that all pardons, &c., by us pardoned, &c., to the aforesaid Robert, John, &c., and to all other offenders, breakers of any statutes, ordinances, proclamations, or provisions made by Us or Our progenitors, &c., touching any tanners, bounders, possessors, blowers, workers, buyers, vendors, merchants of tin, or any other meddling with tin as aforesaid, may and shall be in Our next parliament, &c. authorized, and that all grants by Us granted, and all annulling of all statutes, acts, &c. aforesaid, by Our grants aforesaid annulled, at the petition and request of the said Robert, John, &c., shall be confirmed in the said parliament; that as well the same Robert, John, &c. may enjoy all Our said grants and annullings, so that all statutes, &c., (a) before made, shall be revoked, annulled, and made void, according to the advice and counsel of the advisers or adviser of the aforesaid Robert, John, &c., to their best profit and greatest advantage, as to them shall seem best to be done. And further, We have granted, &c., to the aforesaid Robert, John, &c., that no supervisor of Our customs and subsidies in Our county of Cornwall aforesaid, nor any searcher of the same customs and subsidies in the said county, from henceforth, shall take for the weighing of any tin going out of this Our kingdom of England for his fee by reason of the weighing of the same tin so going out of Our kingdom of England aforesaid, only the same as is given to him and to all other weighers by a certain statute made in the parliament of the Lord Edward III., late King of England, Our

(a) Some of these former provisions may be seen below.

Charters 18 Johan.

Exon' ep'us, decima stanni in Devon et Cornub', Calend. Rot. cart. 30.

R. concessit et assignavit Will'o S' vat omnes exitus de cuneo stagminis R. in Cornub' provenientes usque ad in unum annum p'x' sequen'; Ita q'd si idem Will's quingentas marcas et pcium vinor' ab ipso empt', qd ad septingentas et quinquaginta libr' se extendit, de dc'is exitibus infra annum pdc'm levare non possit tunc eidem Will'o de eo qd sibi inde defuerit in garderoba R. satisfieri faciet, &c. Ro. 7. 32 Edw. I. Abbr. Rot. Originalium, vol. i. 133.

Thomas de la Hide, Johannes de Treddewy, Phillippus le Wenche, Thomas de Lostwell, Henry de Pridias, Philippus de Medros, et Johannes le Toller, finem fecerunt cum R. per centum marcas, pro cartâ Regis habendâ de libertatibus, stannatoribus in stannariâ Regis in Comitatu Cornubiæ operantibus, concessis, &c. 33 Edw. I. In ced'. Abbr. Rot. Originalium, vol. i. 141.

R. &c. salt'm sciatis qd de fidelitate et industriâ dil'ci mercatoris n'ri Antonini Pessaigne plurimum confidentes ip'm Antoninum ad emend', ad opus n'rm, totum stagnum quod in com. Cornub' vendend' fuerit, no'ie n'ro duximus assignand'. Ita qd idem Antoninus de exitibus provenientius de cuneo stagminis p'ci nob' respondeat, &c. 6 Edw. II. ro. 4. Abbr. Rot. Originalium, vol. i. 194.

R. Henrico de Wylyngton senescallo suo Cornub' salt'm: licet nuper concesserimus Antonio Pessaigne de Janua empc'o'em stagminis in com' Cornub', h'end' q'mdiu, &c. vobis nichilominus mandamus, &c. sine dil'one resumatis, &c. 10 Edw. II. Abbr. Rot. Originalium, vol. i. 234.

R. concessit Steph'o de Abyngdon pincerne R. coignagium stagminis in com' Cornub' & Devon h'end', &c. q'mdiu, &c. Ita q'd, &c. 10 Edw. II. Abbr. Rot. Originalium, vol. i. 237.

progenitor, holden in the 14th year of his reign, (that is to say,) for every weight of forty pounds, one farthing, and from the weight of forty pounds unto the weight of one hundred pounds, one halfpenny; and for every weight of one hundred pounds unto the weight of a thousand pounds, one penny, and no more. And further, We grant that every weigher of tin in Our town of Southampton for the time being shall take from every merchant of tin in Our county of Cornwall for the weighing of his tin brought into Our town of Southampton, the same as is given to him by the said statute and no more. Witness the King, at Westminster, the 12th day of July, in the twenty-third year of Our reign.

By writ of Privy Seal.

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*Warrant for Commission for holding a Convocation of Tinnars.*

THOS. Cantuar., Hardwicke, C., Granville, P., Hartington, Holderness.—These are in His Majesty's name to authorize and require you forthwith to prepare a bill to pass His Majesty's seal, in the words or to the effect following:—"George the Second, &c. To Our right trusty, &c., James, Earl of Waldegrave, Warden of our Stannaries, greeting, Whereas divers and sundry things are at this time very requisite to be redressed and provided for within Our stannaries of Cornwall and Devon, by which the privileges and liberties of Our said stannaries heretofore granted by Our royal predecessors, kings and queens of this realm, unto the tinnars of the said respective stannaries, ought, as in like cases have always heretofore been used and accustomed, to be amended, redressed, and provided for, by and with the consent of a convocation or parliament of tinnars for the stannaries in the said respective counties to be summoned by virtue of letters under the privy seal to the warden of the stannaries for the time being directed, and not otherwise. We, therefore, not minding to break or take away the liberties, privileges, and customs of Our said stannaries, but to establish, augment, and confirm the same, and also to have the same from henceforth used, executed, and continued, in as large and ample manner as they have been heretofore: Do require and demand you, by virtue of, &c."

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*Presentment by Convocation of Tinnars.*

We present and affirm, that by common prescribed to stannary right, any tinner may bound(a) any wastrel lands within the

(a) The mode of acquiring a right to tin bounds is this:—An agent goes on the spot to be bounded, and digs up the turf or surface, making little pits at the four corners towards the east, west, north, and south, of a reasonable extent, and the area or space within the four corners will be the contents of the bounds. Having made these corners, the agent describes on paper the situation of the



county of Cornwall that is unbounded, or void of lawful bounds, and also any several and inclosed land that hath been anciently bounden and assured for wastrell, by delivering of toll tin to the lord of the soil, before that the hedges were made upon it; and also such and so much of the prince's several and inclosed customary land within the ancient duchy assessionable manors, as hath been anciently bounded with turfs according to the ancient custom and usage within the said several duchy manors, and not otherwise, the tinner paying out of such land, so bounded, the usual toll only as is generally paid with the stannaries, that is, the fifteenth dish or part, saving in such places where a special custom hath limited another rate of toll.

## APPENDIX G.

*Proceedings on a Monstraunce de Droit (a), wherein it was held that the King, reversioner in fee, was bound by the warranty, with assets, of his ancestor, the Earl of Cornwall, tenant in tail.*

It was found by office before an escheator and returned into Chancery, that the King Henry, (Henry III.) the great grandfather of Our Lord the King who now is, (Edward III.) was seised of the manor of C, and gave the same manor to Edmund, Earl of Cornwall, and to the heirs from his body issuing, saving the reversion to him and his heirs on default of issue, and that Edmund was dead without issue of his body, wherefore the said manor was revertible to our Lord the King by cause of the reversion.

Whereupon came one Margaret, who was the wife of William de Chiseldon, and said that she did not acknowledge the entail, (b) but that this same Edmund, Earl of Cornwall, by his deed (which is produced) with clause of warranty gave the same manor to one William Chenduit, to have and to hold to him and his heirs for ever, in exchange for another manor, which the said William gave to the said Edmund and to his heirs; and she said that the said

bounds, states the day when and the person by whom they were marked out or cut, and makes a declaration for whose use this was done, expressing therein that the spot was free of all lawful bounds. At the next Stannary Court he procures this description to be put on parchment or paper, and a first proclamation is made of it in open court, the parchment or paper being stuck up in a conspicuous place in the Court; and a minute of the transaction is made by the steward in the regular Court paper. On the next Court day, three weeks afterwards, a second proclamation is in like manner made, and so also at the third Court; when, if there be no successful opposition, judgment is given, and a writ of possession issues to the bailiff of the stannary, who delivers possession accordingly. After this, the bounds must be renewed annually, or the lord may re-enter. In this mode the bounder acquires a right to search for and take all the tin he can find, paying the lord of the soil one fifteenth, or to permit others to do so; and to resist all who attempt to interrupt him.

(a) This appears to be the first instance of a monstraunce de droit brought upon the then recent statute of 36 Edw. III. vide Mann. Exch. Pract. 2d edit. 87.

(b) A protestation.

Edmund, Earl of Cornwall, was ancestor to Edward, (Edward I.) the grandfather of our Lord the King, who now is, that is to say, cousin; and she showed how he was cousin; and she said that assets descended to the said Edward the grandfather of our Lord the King, from this same Edmund in fee simple, viz. the manors of A, B, and C, in the county of Somerset (a); and she prayed judgment, if contrary to the said charter which comprehends warranty and the said descent to the grandfather of our Lord the King, by which the right of the reversion in the father (Henry III.) of the said Edward, (Edward I.) the grandfather of our Lord the King was extinct, she ought to be impeached of the said manor by our Lord the King; and she showed how she was seised of the estate of William Chenduit

*Bell.* Not acknowledging the feoffment made by Edmund, (b) we pray judgment, since she does not deny that Edmund who aliened had only fee tail. So that the said alienation (will be) to the disherison of the King, if the King in such case shall be barred.

And afterwards search was made, and it was found of record (c), that Edmund died seised of the manors in fee simple, which descended to Edward, the grandfather of our Lord the King, as was alleged. Wherefore Margaret had restitution of the said manor, &c. 45 Lib. Ass. fo. 208, pl. 6 (d).

## APPENDIX H.

*Order of Court of Exchequer upon an Information against Disturbers of Duchy Lessees of Copper.*—10 July, 1762.

THE order states that His Majesty, in right of his duchy of Cornwall, is seised in fee simple of and in the manor of Tywarnhaile within the several parishes of St. Agnes and Perranzabulo in the county of Cornwall, and his royal progenitors, Dukes of Cornwall, kings of England, and others lords of the said manor for the time being, from time immemorial have been seised of all mines and minerals whatsoever in or under all and every the lands and grounds, as well such as were cultivated as open and waste lands, or commons lying within the said manor, and all rights and liberties whatsoever requisite and necessary for getting and evincing the ore therefrom, and dressing the same, and they and their lessors, farmers, or servants, from time to time, from time whereof the memory of man is not to the contrary, have constantly enjoyed all such mines and minerals, and used and exercised all such

(a) So Wallingford in Berkshire. See *Concessio Honoris de Wallingford Edmundo de Alman* quondam comiti Cornubiæ. Jones's Index Exch. Rec. Trinitatis Recordæ 21 Edward I.——Wallingford Honor ad manus regis jure hæreditario post mortem Edmundi nuper comitis Cornubiæ, Ibid. Paschæ Fines, Edw. I.

(b) Another protestation.

(c) By the *inquisitio post mortem*, supra 460, ut videtur.

(d) And see Lord Dyer's argument, Plowd. 234.

rights, liberties, and privileges, and received the profits and advantages thereof for their own use and benefit without interruption till very lately, and that his late Royal Highness Frederick Prince of Wales and Duke of Cornwall, deceased, was on and for several years before the 3d of July, 1742, in right of the duchy of Cornwall, seised of the same manor and of several other manors in and parcel of the said duchy: it then recites that lease 1742. The order then recites the death of Mr. Lemon in 1760, and that he appointed Vivian and those other parties his executors. Then it goes on to state that they were entitled to the benefit of the said lease, and had by themselves, their undertenants, servants, and workmen, enjoyed the same, and that it had been usual from time to time for many years for persons conversant in working of mines to apply to the lessees thereof under the Duke of Cornwall for the time being for liberty to search for and get copper and other materials in or under any particular lands, and for certain times, on condition that to pay such lessee a certain proportional part, usually a sixth or seventh part of all such copper and other minerals as should be gotten thereout, and that it had been usual for such lessee from time to time to grant such liberty, commonly called setts, to such persons under such reservations, and that the persons to whom such setts or licences have been granted, have from time to time constantly worked such mines, and applied the produce thereof to their own use, paying the proportions reserved thereout without any disturbance till lately. Then it further states, that Trevelles Common is part of the manor of Tywarnhaile, and that the pasture of such common had been used and enjoyed with the customary estate of the defendant Joseph Donnithorne called Trevelles within the said manor, and that the plaintiffs, the executors of the said William Lemon, by Hugh Paull, their agent, did, in the year 1760, grant to the plaintiffs, Henry Mudge and others, such sett or licence to dig as aforesaid in the lands aftermentioned on the usual terms, viz. reserving one sixth part of all the copper, other ore and minerals, except tin, which they should get throughout, which the said licence was agreed to extend to, and comprehend a particular part of the said land, common, or waste ground of Trevallass aforesaid, aftermentioned so far west as to join with the Wheal-cock sett on the said common of Trevallass, and sixty fathoms east of the adit on Weal-meadow-land, and ten fathoms south of the said Weal-meadow-land, and that a verbal grant was made accordingly in November, 1760, to commence from that time for and during the remainder of the term granted to the said W. Lemon deceased, by the late Prince of Wales, the lessees rendering to the said plaintiffs one-sixth part of all copper and other ore and minerals, tin excepted.


It then goes on to state that, in pursuance of such licence, the said under-lessees, or their workmen, soon afterwards began to dig for copper and other ore and materials, in and under the said piece of land, and continued so to do for some time, and called their mine or work Weal Frederick, and by the month of August, 1761, they had, after having been at an expense of not less than 159*l.* and upwards in the said work, got out of the said mine a parcel of copper ore to the amount of about ten tons, which was

made merchantable and fit for sale, and that the plaintiffs, the executors of the said William Lemon, caused a set to be granted and a mine to be opened in Frensick Common parcel of and lying within the said manor, called Grambler Mine, and they and their said lessees, agents and workmen dug large quantities of copper ore thereout. Then it further stated, that before the said ore so dug out of Weal Frederick Mine, and made merchantable as aforesaid, was taken away or removed, viz. on or about the 9th day of September, 1761, the said defendant Joseph Donnithorne, who is, or claimed to be, seised to him and his heirs of certain lands situate within and held of the manor of Tywarnhale, according to the custom thereof, under grants made to him thereof by copy or copies of court-roll (a), did, in an outrageous and violent manner, with the assistance of several other persons, take possession of great part of the said copper, alleging he was well entitled thereto, and that he had accordingly converted the same to his own use, and that the defendants Richard Trezize, John Nance, Abel Angove, John Paull, Mary Paull, and John Paull, or some of them, had also at several times, and particularly in August last, forbidden the plaintiff's agents and workmen at the Grambler Mine aforesaid, to work for, sell, or dispose of any ore, and had threatened to take away the same in the like violent manner, and thereby and by means of such threats, had greatly intimidated the plaintiff's lessees and workmen from working for copper ore within the manor, and further informing the court that no customary or other tenant of the manor ever enjoyed any mines or minerals within any lands whatever, either improved or cultivated, on common or waste lands, or exercised any right of digging or searching for ore or minerals, tin excepted, in or under any such lands, without licence or authority for so doing from the lord of the manor for the time being or his lessees, or their stewards or agents, nor did any such tenant ever interrupt or disturb the person claiming under the lord of the said manor in his enjoyment of the mines, or in the exercise of any of the rights or privileges as aforesaid, although all the tenants of the manor had been from time to time constantly apprized of the enjoyment of the mines, and the exercise of the rights and privileges by the lessees of the lord of the manor, or persons claiming under them; but that, on the contrary, such tenants had from time to time constantly consented, or readily submitted to the getting such copper and other ore and minerals, and to the dressing thereof, and making the same merchantable, and carrying the same away: that many of the customary tenants of the said manor had from time to time applied for and accepted licences or setts from the lord of the manor for the time being, or his lessees, or his agents, for searching and digging for and getting copper and other ore and minerals in or under their own lands or other lands, within or part of the said manor, and had gotten copper, or other ore or minerals, in or under such lands, by virtue of such licences, and had paid the usual reservations or duty for the same; and that divers present-

(a) The peculiar nature of the tenure does not appear to have been communicated to the person who drew the information and order.

ments had been made from time to time by the *stannage* (a) of the courts of the said manor of Tywarnhale, which had always consisted of customary tenants of the manor for the time being. And that the lord of the manor for the time being, or his lessees, had been intitled to all mines and minerals in and under all the lands and grounds whatsoever within the said manor; and that the said Joseph Donnithorne, Richard Trezize, John Nance, and other parties named, had, as was apprehended and believed, entered into some agreement with other customary tenants of the said manor for supporting and assisting each other in the prosecution and defence of all or any suits concerning the right to the said mines and minerals, and had likewise contributed, or agreed to contribute, large sums of money for that purpose; and further stating, that the attorney general, on behalf of His Majesty and the plaintiffs, Richard Hussey, Johnson Vivian, John Richards, and Thomas Daniell, the executors and devisees named in the last will and testament of the said William Lemon, deceased, had lately exhibited an English information and bill of complaint in this court against the said Joseph Donnithorne, Esquire, and others, defendants, before named, stating the several facts before mentioned, and praying, amongst other things, that the rights of His Majesty, as lord of the manor of Tywarnhale, and of the complainants, as claiming under him, might be established and confirmed by the decree of this court; and that the complainants might be quieted in the possession and enjoyment thereof during their respective interest in the premises, and that, in the mean time, the defendants might be restrained by the injunction of this court from molesting and disturbing the complainants, Henry Mudge, Oliver Adams, and others, in carrying on or working the said mines, or disposing of the produce thereof. Then it goes on to state, that the said Joseph Donnithorne, Richard Trezize, John Nance, and Abel Angove, had appeared to the bill; and it was therefore now prayed on behalf of His Majesty, and of the complainants, that an injunction might forthwith issue out of this court for the purposes aforesaid, and on hearing George Perrott, Esquire, one of His Majesty's counsel, and Mr. Cooper, of counsel on the same side, and reading the joint affidavit of Joseph Hawkins, Hugh Paull, and the affidavit of Richard Fezard Mansfield, It is ordered by the Court, that a writ of injunction do forthwith issue out of and under the seal of this court, directed to the said defendants, and commanding and enjoining them not to molest or disturb the complainants, Henry Mudge and others, or any of them, their several labourers and workmen, in digging and searching for ore and other minerals, tin excepted.

(a) q. d. homage of tinnors.



## APPENDIX I.

*Articles administered to the Conventiounary Tenants of the assessionable Mannor of Tewington, whilst that mannor was in the hands of the vendee of the Commissioners appointed, by the Keepers of the Liberties of England for the Commonwealth, for the sale of the possessions of the then late Duchy of Cornwall.*

ARTICLES to be ministered unto the Tennants of the Mannor of Tewington, p'call of the ancient Duchie of Cornewall, by John Menheire, Esquire, now Lord of the saide Mannor, to be inquired of by them, to be sett downe and presented before the said John Menheire, at his surveyinge (a) and assessioning of the said Mannor in Austell (b) Towne, the Twentie-eighth, Twentienynth, and Thirtieth dayes of October, in the Yeere of our Lord God, 1651.

1. FIRST of all by what estate or pretence of right, and how doe you claime to have and enjoye any parte or parcell of the messuages, landes, or tenements, of or belonginge to the saide mannor, and what and how much doe you holde, and by what rents and services, and how much doe you hold by descent and how much by surrender, and who were owners of these lands before you had the same, as you knowe or remember.

2. Alsoe what profit or benefitt doth come to the Lord of this Mannor by the death of every tennant and the surrender of every tenement within the same, or any parte or parcell thereof, and is or ought the Lorde to have a herriott or best beast uppon or after the death of every tennant for every severall tenement which he died seised of accordinge to the custome of the said mannor, and of what yeerely vallew, and quantitie of acres, is every heriotable tenement within the mannor aforesaid to be, and what and how many heriotts or best beasts have been detained from the said Lord since the 25th daye of March in the yeere 1650, and by whome and for what tenement or tenements.

3. Also what or how many tenements doe you know or have heard have been ruinated, decayed, or laid wast within the said mannor, then or before the said 25th daye of March, in the yeere of our Lorde God, 1650, in whose occupation are such decayed tenements, or any part or parcell thereof, and what number of acres doe belonge to those decayed tenements or any of them, and by whose neglect or default came those tenements to be ~~soe~~ decayed.

4. Also doe you knowe or have you heard any part of the rents, tenements, or other profitts, heeretofore paide out of or for these decayed tenements, or any other tenements, lands, woods, or hereditaments whatsoever within the said mannor, to be withheld, forborne, or not paide. If yea, then in whose possession were and are those landes or tenements, woods or hereditaments, and declare the particular rents and profitts left unpaide, and the landes and

(a) The assession courts are also called courts of survey (ante). A survey is the common term still used for an auction held for the letting of farms.

(b) This saint was recanonized upon the restoration.

hereditaments out of which they were or ought to be paide, and how longe and by whome they or any parte thereof have beene forborne to be paide.

5. Alsoe what wasts or spoiles have been committed or don by any tennant or tennants within the saide mannor, either in houses, gardens, orchards, woods, or enclosures, or by felling of timber trees before or sithence the saide 25th daye of March, and by whom and when and where were such wasts and spoiles comitted, and of what value were such wasts and spoiles as you knowe and have hearde; and whether hath any customary tennant within the said mannor sold or disposed of any timber trees (a) from his or their customary tenement or tenements where the same trees did growe, to whome was the same sold, and of what value were such trees.

6. Also what incroachments or inclosures doe you knowe to have been made upon or in any of the lord's landes, comons, or wasts within the mannor aforesaid, before or sithence, the saide 25th daye of March; and whether have all the coppes woods within the saide mannor been well fenced and kept from spoil for the preservation of the younge springes.

7. Also what woods are or ought to be in the possession of the Lord of the saide Mannor, of what quantitie, growth, and value are the same now, who hath or have the herbage and pasture of the wood-grounds, and of what yeerly value is the same, by whose graunt or right, and how doth or doe any tennant or tenants of this mannor, or anye other persons or persons hold or enjoye the said herbage and pasture, and how long is the same graunt, if there be any such, to contynue and indure, and is or are not such tenant or tenants, person or persons to whom this graunt is made, to fence and repaire the fences and hedges belonging to the saide woods from time to time, doth or doe hee or they performe the same accordingly, and are the fences and hedges belonginge to the said woods now sufficiently repaired.

8. Also what mynes, quarries of slat, or heling stones (b), or tyn-works, now are within the said mannor, where doe they ly, by whom, for whome, and when were they made and opened, what profitts have been made of them, and who hath taken the profitts thereof, and by what right or pretence of right have such persons taken or received the same, as you knowe or have heard, and what moveth you to saye soe.

9. Also what moores, marshes, wast landes, comons, or comon of pasture, are there within, of, or belonginge to the said mannor, of what yeerly value and quantitie of acres are they and every of them, are they or any of them stinted or not stinted, to whom doe the same or any of them belonge now, and by what estate or colour of right doth or doe any person or persons claime to have and enjoy them or any of them, what severall rents and services are there respectively paid or performed for them or any, or which of them, and by whome and to whome, and by what name or names are they and every of them called or knowne, and where doe they and every of them lye, and how are the same bounded.

(a) *Vide ante.*

(b) *Vide ante*, 202 (a), 292 (a).

10. Also what relieffs (a), escheats, heriotts, issues, fines, and amerciaments, or other duties, have become due for any lands within the said mannor since the said 25th daye of Marche, and whether have the same been truly estreated, levied, and paid by the officers for that purpose as hath been accustomed, and whether you do knowe of any of these duties concealed, imbizled, or detained, and by whome, when, and how.

11. Also when a customary tenant dyeth without surrenderinge, or otherwise convayinge or disposeinge of his or her customary tenement, whoe then by the contynual use and custom of this mannor ought to be admitted next tenant of or for the same to the Lord of the said mannor.

12. Also when a tenant of a customary tenement of the mannor dyeth seised of a customary tenement, leavinge a wiffe behinde him, what estate or interest hath the wiffe in the said tenement by and after the death of her husband, and how and in what manner, by the custome of this mannor, ought shee to enjoy or dispose of the said tenement, can shee surrender the same or any part thereof to any person or persons if he or they to whome such surrender is made or to be made, be not next heire of or to her deceased husband (b).

13. Also when a customary tennant dyeth seised of any customary tenement within the said mannor, havinge no heriotable beast at the tyme of his or her death, who then must, or ought the next heirs of such a customary tennant, or his executor, having assets to, pay the best beast due to the Lord of the Mannor accordinge to the custom of the said mannor for such a customary tenement.

14. Also by and before whome, and in what court or courtes, are and ought the tennants and resiaunts of the said mannor to be justified, ordered, and tryed, for all matters, causes, and thinges arisinge upon the sea within the precincts of your mannor, and how long have they been soe justified and tryed, by and before whome and in what courte or courtes have they or any of them been lately or are now impleaded and tryed for these thinges, and what costs, damages, oppressions, or hinderances, have any of them suffered or sustained thereby, how and by what name or names are the bounds of the said mannor bordering upon the sea-shore distinguished or knowne, whoe ought to have the wracks of the sea (c) happening and cominge upon or to the shore between those bounds, and what parte thereof is and ought the Lorde of the Mannor to have by the custome of this mannor.

15. Also what fines or amerciaments have been used to be taken by the steward or other officers at the assessinge of takeing, upon admittance of any customary tenant; into whose handes is the sayd monye paid; what parte thereof doth com or belonge to the Lord of the said mannor.

16. Also what weares, fishings, or mills, and what other fish-

\* (a) The term, "relief," was applicable both to freehold and copyhold estates of inheritance, unless the former were held by knight's service.

(b) This was the point in issue between the surrenderee of the wife and the customary heirs of the husband, in *Skelton v. Starke*, ante, 449.

(c) *Vide ante*, 477.



ings are there within the said mannor erected or made upon the Lord's rivers or waters, by whome were or are they soe erected or made, how long since, and of what value are the same; and what herrings or other fish have you known or heard of to be taken within or in any of the saide rivers, by drift-netts, drawinge-netts, or otherwise, by whome and by whose permission hath the same been taken, and what consideration hath been paid to any person or persons for licence to take the same.

17. Also what lands, rents, or services are concealed or detained from the lord within the said mannor, how long, by whome, and by what right or pretence of right have the same been soe concealed or detained to your knowledge, or as you have heard or remember.

18. Also what and how many griest-mills, fullinge-mills, stamping-mills, dwelling-houses, or other houses, have been erected or built upon or in the wast lands or comons of or belonging to the said mannor, and what yeerely rents or profitts and services hath or ought the Lord of the said mannor to have for the same, and whether any have inclosed the said wast land or comons, or any parte thereof, of what yeerely value is or are the said mills, and houses, and every of them; and alsoe of what quantitie and yeerely value are the said lands soe inclosed, when, and by whome and for whome were the said mills or houses edified, and the said waste lands or comons, or any part thereof, inclosed; and in whose possession or occupation are they or any of them now; what are the said mills, houses, and inclosed lands now worth yeerely and what respective rents and services are there now paid and performed for them or any of them.

## APPENDIX K.

*Amount of Rents of Free and Villein Conventionaries in the manor of Tewington, at the different Periods referred to at the Trial of Rowe v. Brenton.*

|                                                                  | £. | s. | d. |
|------------------------------------------------------------------|----|----|----|
| 29 Ed. 1. Vide Inquisition, <i>suprà</i> , 153 . . . .           | 13 | 11 | 2  |
| 7 Ed. 3. — Assession, <i>suprà</i> , 179, 181 . . . .            | 20 | 6  | 7½ |
| 11 Ed. 3. — Caption, <i>suprà</i> , 159 . . . . .                | 20 | 11 | 7½ |
| 16 Ed. 3. — Castle-gothon's accounts, <i>suprà</i> , 190 . . . . | 18 | 8  | 1½ |
| 19 Ed. 3. — Pounder's accounts, <i>ibid</i> . . . . .            | 20 | 10 | 7½ |
| 21 Ed. 3. — Assession, <i>ibid</i> . . . . .                     | 26 | 13 | 5½ |
| 22 Ed. 3. — Simund's accounts, <i>suprà</i> , 195 . . . . .      | 26 | 13 | 5½ |
| 30 Ed. 3. — Gilloun's accounts, <i>suprà</i> , 196, 207 . . . .  | 23 | 10 | 0½ |
| 38 Ed. 3. — Assession, <i>suprà</i> , 197 . . . . .              | 24 | 9  | 6½ |
| 45 Ed. 3. — Assession, <i>suprà</i> , 198 (a) . . . . .          | 23 | 6  | 7½ |
| 38 H. 6. — Roger's accounts, <i>suprà</i> , 199 . . . . .        | 17 | 15 | 4  |

(a) Stated there by mistake to be 48 Edw. III.

|                                                           | £. | s. | d.  |
|-----------------------------------------------------------|----|----|-----|
| 18 Ed. 4. Vide Colyn's accounts, <i>suprà</i> , 200 . . . | 11 | 11 | 10½ |
| 20 Ed. 4. — George's accounts, <i>ibid</i> . . .          | 19 | 2  | 2½  |
| 23 H. 7. — Philip's accounts, <i>suprà</i> , 202 . . .    | 20 | 4  | 3½  |
| 1787. — Assession Book ( <i>a</i> ) . . .                 | 22 | 12 | 6½  |

*Rents of Freeholders, (b).*

|                                                      |   |    |    |
|------------------------------------------------------|---|----|----|
| 29 Ed. 1. Vide Inquisition, <i>suprà</i> , 153 . . . | 8 | 9  | 4½ |
| 11 Ed. 3. — Caption, <i>suprà</i> , 159 . . .        | 8 | 12 | 4½ |
| 1787. — Assession Book ( <i>a</i> ) . . .            | 8 | 13 | 3½ |

(*a*) Referred to for another purpose, *suprà*, 212.

(*b*) In the course of the trial at bar, the *liberè tenentes* were frequently called "free tenants." This expression appears calculated to create confusion, and particularly so with reference to the matters in dispute in this cause; since all the free men who held land within the manor were "*free tenants*," *liberè tenentes*; though only those who held *of*, and not *within* the manor, were *liberè tenentes*, or freeholders.

In the caption of seisin the first amongst the freeholders of Tewington is William de Bodrugan, who is stated to hold of the lord the duke in socage 7 cornish acres of land in Tregrean, rendering for the same yearly, at the four several terms of the year, in equal portions, 18s. 6½d., and for fine of tin at the feast of St. Michael, 14d.; and doing suit at the court of the lord duke from three weeks to three weeks. These seven cornish acres still constitute the submanor of Tregrean, within which are also to be found conventional tenants. At the trial at Exeter two inquisitions *post mortem*, wherein mention is made of the manor of Tregrean, were produced; the former taken on the death of Henry de Bodrugan, in 2 Edw. II.; the latter on the death of Otho de Bodrugan, in 15 Edw. II. Each of these documents enumerates freeholders, conventional tenants, and villeins; and as the conventionaries are described as holding *at the will of the lord*, it is evident that they must have belonged to the class of villein conventionaries, and either were, or had been villeins; and that the villeins who form the third class in those documents must be villeins of stock, holding without any covenant or convention. It does not appear at what period the subinfeudations, by which the submanor was created, took place; in other words, when the Bodrugans, or the parties seized of Tregrean, granted off part of the lands at Tregrean, to be holden of themselves in fee simple. It must, however, have been before the statute of Quia emptores, (1284.) Nor can it now be ascertained whether the conventional estates in Tregrean existed at the time of the grant to the Bodrugans or their predecessors of the lands at Tregrean by the lord of Tewington. If they did then exist, the lord's interest in these estates would pass to the subinfeoffee of the freehold, as the seignior of a copyhold, at this day, passes to the grantee of the freehold. If, however, these conventional tenements, as was most probably the case with some of them, were created subsequently to the subinfeoffment of Tregrean, whether before or after Tregrean itself had become a manor by the further subinfeoffment of the freeholds now held of Tregrean, they would appear to have been so created from a desire on the part of the owner of Tregrean to extend the same privileges to those villeins who had been granted to him, and made regardant to his manor or his freehold of Tregrean, as were enjoyed by those who continued to be regardant to the manor of Tewington. On the death of Otho de Bodrugan, in 1321, the manor of Tregrean contained thirty conventionaries, holding at the will of the lord, and the service of eleven freeholders.

The splendour of the Bodrugan family appear to have terminated with Sir Henry de Bodrugan, who forfeited his large possessions for having been with John, Earl of Lincoln, at the field of Stoke, 6th June, 1487, (*Rapin de Thoyras*, vol. iv. 424, Hague ed. 1724). The king (Henry VII.) granted these possessions to Sir Richard Eggecombe, Knt., whom he employed in the negotiation of a treaty with Scotland, and appointed feodary of Cornwall and constable of

## APPENDIX L.

*Table, shewing the Variation and Apportionment of the Rents and Fines of Lamellyn.*

|                             | 1st Portion. |       | 2d Portion. |       | 3d Portion. |            | 4th Portion. |       |
|-----------------------------|--------------|-------|-------------|-------|-------------|------------|--------------|-------|
|                             | Rent.        | Fine. | Rent.       | Fine. | Rent.       | Fine.      | Rent.        | Fine. |
|                             | s. d.        | s. d. | s. d.       | s.    | s. d.       | s.         | s. d.        | s.    |
| 5 Ed. 3 ....                | 8 6          | —     | 8 6         | —     | 8 6         | —          | 8 6          | —     |
| 7 Ed. 3 ....                | 11 0         | 20 0  | 11 0        | 20    | 11 0        | 20         | 11 0         | 20    |
| 11 Ed. 3 ....               | 11 0         | —     | 11 0        | —     | 11 0        | —          | 11 0         | —     |
| 21 Ed. 3 ....               | 11 0         | 20 0  | 11 0        | 20    | { 5 6 } 10  | { 5 6 } 10 | 11 0         | 20    |
| 38 Ed. 3 ....               | 11 0         | 33 4  | 11 0        | 22    | { 5 6 } 10  | { 5 6 } 10 | 11 0         | 20    |
| 45 Ed. 3 ....               | 11 0         | 26 8  | 8 0         | 20    | { 5 6 } 10  | { 5 6 } 10 | 11 0         | 20    |
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| 1650 <sup>suprà</sup> , 174 | 11 0         | 3 4   | 11 0        | 5     | 11 0        | 5          | 9 0          | 5     |

Launceston Castle, (6 Rot. Parl. 367). And see the proceedings in 14 Edw. IV. against this last Bodrugan, then "Henry de Bodrugan, squyer," and Richard Bonethon, gentleman, for forcibly entering "a tynne work called the Cleker," of Thomas Nevill, and feloniously taking away "the tynne, stuffe, and ordonnance to the same myne belonging of the said Thomas." In his justification, Bodrugan alleged, that the mine had been first discovered by certain poor tenants of the lord duke, upon whom Nevill had forcibly entered, and that he, as justice of the peace, had restored the mine to the original owner. The course pursued on the occasion of this outrage is not a little extraordinary. Nevill first obtained an act of parliament, requiring Bodrugan to surrender before a certain day. Upon his surrender he was to be examined before the justices of B. R. or C. P., whose judgment, if against him, was to have the force of a conviction at common law; and he was to stand attainted of the felony, &c. if he did not render himself at the day. Bodrugan did not appear, and his lands, &c. were seized. He then petitioned for a reversal of his attainder, asserting his innocence, and representing that he had been afraid to venture his life by surrendering upon such hazardous conditions. Upon this application the attainder was reversed; and nothing further appears. 6 Rot. Parl. 132.

## APPENDIX M.

*Table of Matters, Places, and Persons, relating to the Duchy of Cornwall, and referred to in the course of the Trial at Bar.*

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\* Henry III. in the 33d and 36th years of his reign, granted to his eldest son Edward (I.) *totam terram Vascon. et insulam Oleronis*, *Cal. Rot. Pat.* 22 b. 24; and the same king afterwards (43 Hen. III.) *concessit Edwardo primogenito suo insulam Oleronis, ac eandem undecim coronæ Angliæ, ib.* So, in 34 Edw. I. the king granted the duchy of Aquitaine to his eldest son Edward, (II.) *ib.* 66, b. After the death of the Black Prince, we find John of Gaunt, his brother, described in the parliament rolls as *duke of Aquitaine*.

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\* This word, in later times written "cockshot" and "cockshut," appears to have been used to denote an opening in a wood, as being a place where woodcocks lie concealed or shut during the day, or as a spot from which they take their flight or shoot at twilight. Hence "cockshut time" is used for "twilight," in Richard III. act 5, scene 3. As a net frequently drawn across these openings, for the purpose of catching the woodcocks in their flight, was called a cockshot net, it has been supposed by several of the commentators on Shakspeare, that the term cockshot itself meant a net. The successive editors appear to have been as much puzzled with this word as DuCange had been by its Latin equivalent "*volata*," *ante*, 470.

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\* Rex confirmavit indenturam factam inter Principem Wallie Ducem Cornubiæ, et Tidemannum de Limbergh, per quam Princeps tradidit ad firmam dicto Tidemannno pro tribus annis, cunagium stannariæ totius ducatus Cornubiæ, unacum proficuo et emptione totius stanni tam infra dictum ducatum quam comitatum Devon', reddend' Principi mille marcas præ manibus et mille marcas per annum. Cal. Rot. Pat. 155. And see *ante*, 195, (c).

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\* De tractando pro maritagio inter Johannem de Eltham, comitem Cornubie, fratrem regis, et Mariam, filiam et heredem Johannis quondam domini de Biscay, impuberem. Cal. Rot. Par. 106.

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TO THE

## PRINCIPAL MATTERS.

### ACTION.

#### ABATEMENT.

See COSTS, 1.

#### ACCOUNT STATED.

1. Where plaintiff declares for work done and upon an account stated, and money is brought into Court on the latter count only, he is not entitled to a verdict upon proof of work done, though no evidence be given of an account having been stated, and the money paid in greatly exceeds the sum due for work, and would be covered by a demand which the plaintiff has against the defendant by specialty. *Churchill v. Day.* page 71

#### ACCOUNTS.

See RECEIVER'S ACCOUNTS.

### ACTION.

- I. *Where any action maintainable.*
1. A bailiff having seized goods under a *fi. fa.* against *B.*, is authorized by *A.* the creditor, to quit possession, *B.* consenting that he may return and sell. The bailiff quits possession and afterwards returns and sells, and the sheriff pays the proceeds to *A.* Before the sale *C.* issues a *fi. fa.* against *B.*, to which

### ACTION ON THE CASE.

the sheriff returns *nulla bona*; *C.* recovers the value of the goods from the sheriff in an action for a false return. *A.* is liable to the sheriff for the damages and costs recovered by *C.* unless he can shew that the sheriff was conscious of the misconduct, or that the action is brought for the benefit of the bailiff. *Crowder v. Long*, Gent. &c. page 17

#### II. *Assumpsit or Covenant.*

2. *A.* contracts by deed to do work for *B.*, the remuneration to be fixed by *C.* *C.* fraudulently awards that nothing is due. *A.* cannot sue *B.* in *assumpsit*. *Churchill v. Day.* 71

#### III. *Within what period to be commenced.*

See BANKRUPT, 3.

### ACTION ON THE CASE.

#### I. *Negligence.*

1. Where *A.* by the wrongful act of *B.* loses his presence of mind, and in consequence runs into danger, and receives an injury from the act of *B.* the latter is not protected by a warning given to *A.* immediately before the accident. *Woolley v. Scovell.* 105

- II. *For injury to an expectant interest.*
2. Maintainable, though the premises be not in the possession of a party who stands in the relation of tenant to the plaintiff. *page 107, n.*

## ADMITTANCE.

*See EVIDENCE, 3.*

## AFFIDAVIT.

I. *To hold to bail.*

1. An affidavit of debt, stating that defendant was indebted to plaintiff "as liquidator of an estate duly appointed by the law of France" is defective, for not shewing that plaintiff as liquidator is by the law of France entitled to sue. *Tenon v. Mars.* 38
2. Affidavit to hold to bail for money paid for the use and benefit of the defendant without adding "at his request" is insufficient. *Pitt v. New.* 129

## AMERCIAMENT.

*See EVIDENCE, 8.*

## ANCIENT DEMESNE.

1. Inquiry into the nature of this tenure. 230 (a)

## ANNUITY.

*See BARON AND FEME, 3.*

## ANNUM DIEM ET VASTUM.

*See ESTATES, 2.*

## APPEAL.

I. *Practice relating to.*

1. It is unnecessary to enter and re-spite an appeal, where the order of removal is served too late to try at the next sessions. *Rex v. Justices of Kent.* 15

## ARREST.

2. Parish officers ought to be allowed a reasonable time after the service of the order of removal to consider whether they will appeal or not. *page 15*

## APPOINTMENT.

*See CHURCHWARDEN, 1.—STAMPS, 2.*

## APPRENTICE.

I. *Jurisdiction of magistrates.*

1. Where money is advanced by the overseers to an infant about to be apprenticed for the purpose of providing her with clothes, the indenture is void unless approved of by two justices under 56 Geo. 3, c. 139. *Rex v. Mattishall.* 386

## ARBITRAMENT.

*And see ACTION, 2.*

- I. *What submission is within 9 & 10 W. 3, c. 15.*
- See 74 (b).*

II. *Award.*

1. An award fixing the rule for calculating the amount of money to be paid without stating the result of such calculation, is sufficiently certain. *Higgins v. Willes.* 382

III. *Enforcing performance of award.*

2. The Court will grant an attachment for the non-payment on demand of money awarded after an action on the award commenced and discontinued, where the action was not pending at the time of the demand. *Higgins v. Willes.* 382

## ARREST.

*And see AFFIDAVIT, 1, 2.—COSTS, 2.—JUSTICES, 3.*

1. Not allowed at common law until after a default in appearing to prior process 41, n.

## ATTORNEY, POWER OF.

2. Fictions by which this rule is evaded in the superior Courts. *page 41, n.*

## ASSESSIONABLE MANORS.

*See* CONVENTIONARIES, 1.—EVIDENCE, 16, 18.

## ASSISTANT OVERSEER.

1. The office of assistant overseer under 59 *Geo. 3. c. 12*, is a public annual office within 3 & 4 *W. & M. c. 11, s. 6. Rex v. Lew. 369*
2. If a salary be annexed to the office of assistant overseer, the appointment requires a stamp under 55 *Geo. 3, c. 184*, and service of the office for a year under an unstamped appointment confers no settlement. *ibid.*

## ASSUMPSIT.

- I. *Where the proper form of action.*  
*See* ACTION, 2.

## ATTACHMENT.

*See* ARBITRAMENT, 2.

## ATTORNEY.

### I. *Bill of costs.*

1. If an attorney's bill be referred for taxation after he has commenced an action upon it, the defendant is not entitled to the costs of taxation, though the bill be reduced one-sixth by the master. *Jay, Gent. one &c. v. Coaks. 35*

## ATTORNEY GENERAL.

*See* PREROGATIVE, 3.

## ATTORNEY, POWER OF.

*See* INSURANCE, 4.

## BANKRUPT. 535

### AT THE WILL OF THE LORD.

1. Effect of omission of these words. *page 334, 335 (a).*

## AVOWRY.

### I. *Form of.*

1. For damage feasant. 466

## BAIL BOND.

1. After a stay of proceedings in the action against the bail, the principal may plead bankruptcy in the original action unless the bail bond has been ordered to stand as a security. *Sainsbury v. Gandon. 16*

## BAILIFF.

*See* ACTION, 1.

## BANKRUPT.

*And see* COSTS, 4.

### I. *Property, what vested in assignees.*

1. *A. B.* and *C.* part owners of a vessel, are partners in whale fishery adventures, in which the course has been for *C.* as ship's husband to sell the whalebone towards expenses, to deposit the blubber in a warehouse rented by *A. B.* and *C.* of *B.*, to divide the oil there produced, to put it into separate casks marked with their respective initials and for *D.* the warehouseman, to deliver out the oil upon the order of each partner respectively, unless notice be given by *C.* that such partner's share of the disbursements is unpaid, and in that case to detain the oil until payment. 29 tons having been set apart for *A.* and placed in casks marked with his initials, and 20 tons having been delivered to his order, he becomes bankrupt, his share of the disbursements being unpaid. Afterwards notice of the non-payment is given

## 536 BARGAIN AND SALE.

by C. to D. B. and C. have a lien as against the assignees of A. upon the remaining 9 tons for A.'s share of the disbursements, not abandoned by the qualified appropriation of the 29 tons, or by the assent to the removal of the 20 tons.

*Holderness v. Shackels.* page 25

2. March 5, A. issues a *fi. fa.* against B. and C. upon a judgment by confession, returnable May 2. May 1, B. and C. pay the debt to the sheriff. B. commits an act of bankruptcy on May 2, and C. on May 5. May 11 a commission issues against B. and C. May 15 A. receives the debt from the sheriff. A. may hold the amount against the assignees of B. and C. *Morland v. Pellatt.* 411

### II. Action by assignees.

3. An entry by assignees into the house of a third person, to take the goods of a bankrupt, is not "any thing done in pursuance of" 6 Geo. 4, c. 16, s. 44, so as to render it necessary that the action should be brought within three calendar months. *Edge v. Parker.* 365
4. Where a defendant obtains security for costs on the ground that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy. *Manley v. Mayne.* 381

### III. Rights of bankrupt.

5. After stay of proceedings in an action on the bail bond, there may be a plea of bankruptcy in the original action, where the bail bond is not ordered to stand as a security. *Sainsbury v. Gandon.* 16

## BARGAIN AND SALE.

### I. Use, where raised by way of.

1. Grant (by the freeholder) of a term of years, in consideration of money advanced, transfers the legal posses-

## BILLS OF EXCHANGE

sion to the grantee, without words of bargain and sale, and without entry. page 110, n.

### BARON AND FEME.

*And see EJECTMENT, 2.—EVIDENCE, 15.*

#### I. Liability of husband.

1. Where a defendant is sought to be charged with supplies furnished to his wife, during his absence from England, it lies upon the plaintiff to shew what means of subsistence the wife possessed. *Bird v. Jones.* 121
2. Qu. whether the necessity of this proof is dispensed with by evidence of an express promise of payment. *ibid.*
3. By a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher, the husband covenants generally to pay her 250*l.* per annum during her life. The covenant is controlled by the recital, and dismissal from the office justifies non-payment of the annuity. *Hesse v. Albert.* 406

## BILL OF EXCEPTIONS.

### I. When it lies.

1. Upon a trial at bar. 266

### II. When to be tendered.

*Vide ibid.*

## BILLS OF EXCHANGE.

### I. Indorsement.

1. "Pay to A. or his order for my use" is a restrictive indorsement; and the indorsee of A. must hold the proceeds to the use of the restricting indorser. *Sigourney v. Loyd.* 58

### II. Notice of dishonour.

2. The second indorsee of a bill drawn and indorsed by A., and accepted

## CERTIFICATE.

## CORNWALL, DUCHY OF. 537.

by C., for the accommodation of B., the first indorsee is bound to present it to C. for payment, and to give notice of dishonour to A. though neither A. nor B. had any effects in the hands of C. *Norton v. Pickering.* page 23

### BLANKS.

1. The omission of the word "pounds" may be supplied in a bond acknowledged in the sum of "seven thousand seven hundred of lawful money of Great Britain" conditioned for the payment of several sums denominated as pounds, shillings and pence, although the sums secured amount to more than the half of 7700 pounds. *Cole v. Hulme.* 86

### BOND.

*And see BAIL BOND, 1.—SURETY, 2.*

#### I. Form of.

*And see BLANKS, 1.*

1. Penalty in a bond is not necessarily pecuniary. 87, n.  
II. *Solvit post diem.*
2. Payment within 20 years, of interest accruing before 20 years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to negative the plea of *solvit post diem.* *Saunders v. Meredith.* 116

### CAPTION OF SEISIN.

*See EVIDENCE, 2.*

### CARRIER.

*See STOPPAGE IN TRANSITU, 2.*

### CERTIFICATE.

1. *For special jury.*  
*See COSTS, 3.*

### CHARTER PARTY,

*See SHIP, 3.*

### CHURCHWARDEN.

*And see APPEAL, 2.*

#### I. Appointment of.

1. Where a mandamus to admit a churchwarden recites that the party was duly nominated, elected and chosen, "not duly elected," is a good return. *Rex v. P. Williams.* page 402

### CLERK.

*See SURETY, 1, 2, 3, 4, 5.*

### CONSTRUCTION.

*See BARON AND FEME, 3.*

### CONTRACT.

*See VENDOR AND PURCHASER, 1.*

### CONVENTIONARIES.

#### I. Rights of tenants.

1. The conventional tenants within the assessionable manors of the duchy of Cornwall, have a perpetual indefeasible right, to them and their customary heirs and surrenderees, to renew their estate from seven years to seven years. *Rowe v. Brenton.* 361

## CORNWALL, DUCHY OF.

*See CONVENTIONARIES, 1.—EVIDENCE, 2, 5, 6.—FINES ON ALIENATION, 1.—PREROGATIVE, 2.—PRIMER SEISIN, 1.—SEA SHORE, 2.—STATUTES, 2.*

*And see post.*

#### I. Descent of.

1. Limited by the statutory grant 11 Edw. III. to Edward the Black Prince, and the first begotten sons



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of him and his heirs kings of England, (such sons being) dukes of the same place and heirs apparent to the kingdom of England. *page 478*

### COSTS.

#### I. *In what cases allowed.*

1. No costs upon a judgment of non-pros for not entering the issue upon a demurrer to a plea in abatement. *Micklam v. Bate.* 91
2. Where plaintiff arrests defendant without probable cause for a larger sum than he recovers in an action commenced in the Palace Court and removed into this Court, this Court has no jurisdiction to allow defendant his costs under 43 *Geo. 3. c. 46, s. 3.* *Handley v. Levy.* 37
3. Costs of a good jury upon execution of writ of inquiry under 8 & 9 *W. 3, c. 11*, not allowed, although the judge certify that it was a proper cause to be tried by a special jury. *Calvert v. Gordon.* 125

#### II. *Security for.*

4. Security for costs not required from a bankrupt plaintiff resident abroad. *Roper v. Phillips.* 84
5. Where a defendant obtains security for costs on the ground that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy. *Manley v. Mayne.* 381

### COUNSEL.

*See PRACTICE, II.*

### COUNTY PALATINE.

#### I. *Prerogatives of.*

1. How far enjoyed by earls and dukes of Cornwall. 489

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*See EVIDENCE, 3, 4, 8.*

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### COVENANT.

#### I. *Construction.*

1. By a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher, the husband covenants generally to pay her 250*l.* per annum during her life. The covenant is controlled by the recital, and dismissal from the office justifies non-payment of the annuity. *Hesse v. Albert.* *page 406*

#### II. *When the proper form of action.*

*See ACTION, 2.*

### CUSTOMARY COURT.

1. Proceedings in Court of manor of Trematon, upon a claim to a customary tenement held from seven years to seven years, contested between heir and devisee. *Skelton v. Starke.* 449

### CUSTOMARY ESTATES.

*See ESTATES, 1.*

### DAY YEAR AND WASTE.

*See ESTATES, 2.*

### DEED.

*See BLANKS, 1.—OVER.—STAMPS, 1.*

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*See COSTS, 1.*

### DEPOSIT.

#### I. *Where forfeited.*

*See VENDOR AND PURCHASER, 2.*

### DESCENT.

1. Peculiar course of, in the succession to the dukedom of Cornwall. 478

## EJECTMENT.

#### I. *Title.*

1. Perception by a party claiming as

## ESTATES.

heir, of rent accruing due on a day preceding the payment, is not evidence of seisin on such day; still less will it support a fine levied during the period that the rent was incurring. *Doe d. Lidgbird v. Best.*

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2. Possession of land by a woman during three months whilst she continues sole, and by her husband afterwards for forty years, is evidence of title in the heir of the wife sufficient to rebut the inference of seisin in the father of the wife, grounded upon his prior possession; it appearing that the son and heir of the father lived in the immediate neighbourhood during the occupation of the husband. *Doe d. Carr v. Billyard.* 111
3. Mortgagee may recover in ejectment against the mortgagor, without a demand of possession. *Doe d. Roby v. Maisey.* 107
4. Priority of possession, effect of. 112, n.

## ELECTION.

See MANDAMUS, 1.

## ERROR.

I. *From inferior Court.*

See FALSE JUDGMENT.

## ESTATES.

### I. Customary.

And see ANCIENT DEMESNE, 1.—EVIDENCE, 16, 18.—SOCAGE.

1. Effect of omission of the words "at the will of the lord." 334, 335, n.
2. Where tenants pass their estates by surrender in Court by the rod, the tenure is base, and the lord, not the king, shall have the day year and waste. 337, n.

### II. At will.

3. Distinction between the tenancy of a freeman and of a villein. 251 (a)

## EVIDENCE.

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## EVIDENCE.

### I. Written.

1. A document from the Exchequer, purporting to be an extent of crown lands, and pursuing the directions of 4 Ed. 1, stat. 1, may be given in evidence without producing the commission. *Rowe v. Brenton* 164
2. A document from the office of the Duchy of Cornwall, purporting to be a caption of seisin to the use of the duke, by persons assigned by his letters-patent to receive seisin, is receivable in evidence as a public instrument. *Rowe v. Brenton* 156
3. A copy of a surrender and admittance purporting to be signed by the steward, and coming out of the hands of the customary tenant, is admissible in evidence without producing the court roll. *Rowe v. Brenton.* 296
4. A copy, examined by the witness, of a court roll is admissible in evidence, without the production of the original. *Rowe v. Brenton.* 297
5. An inrolment in the office of the Duchy of Cornwall, of a lease purporting to be granted by the king, *vacante ducatu*, is primary evidence of such lease. *Rowe v. Brenton.* 214
6. So an inrolment in the Duchy Office of a lease, purporting to be granted by the Duke of Cornwall, is primary evidence of such lease. *Rowe v. Brenton.* 218
7. Answers to lost interrogatories may be read as admissions by the answering party, although some of the answers be unintelligible *per se*. *Rowe v. Brenton.* 271
8. Entries in court rolls of *amerciaments* imposed, not evidence, without proof of payment. *Rowe v. Brenton.* 303
9. A witness, who produces a document for the purpose of showing a particular clause, may be asked whether he has not inspected documents of the same nature in which the clause is not found,

although such documents are not produced. *Rowe v. Brenton*. 303

10. A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject to a full cross examination. *Rowe v. Brenton*. 212

11. A baptism cannot be proved by a minute written at the time by the parish-clerk, nor by an entry in the parish register, made at a subsequent period by a succeeding incumbent, founded upon such minute. *Doe d. Warren v. Bray*. 428

#### II. Receiver's Accounts.

12. It is no objection to the admissibility of a book containing an account, in which a deceased receiver charges himself with money paid to him, that, on the opposite side of the account, the receiver discharges himself to the same extent, or that the account (being in his handwriting) is not signed by him, or that the name of the party, on whose account the money is received, does not appear in the book, it being shown, *aliunde*, that the person making the entry did not receive the money on his own account. *Rowe v. Brenton*. 268

#### III. Parol, where admissible.

*Et vide supra*, 9, 10.

13. Parol evidence, as to the party to whom a demise is made, not admissible, where the agreement for the demise was in writing. *Rex v. Rawden*. 426

#### IV. On particular issues.

14. Perception by a party claiming as heir, of rent accruing due on a day preceeding the payment, is not evidence of seisin on such day; still less will it support a fine levied during the period that the rent was incurring. *Doe d. Lidgbird v. Best*. 114

15. Possession of land by a woman during three months, whilst she continues sole, and by her husband afterwards for forty years, is evidence of title in the heir of the wife sufficient to rebut the inference of seisin in the father of the wife, grounded upon his prior possession, it appearing that the son and heir of the father lived in the immediate neighbourhood during the occupation of the husband. *Doe d. Carr v. Billyard*. page 111

16. Upon a question as to the right of the lord of a manor to minerals under lands, held by a peculiar customary tenure, and denominated "conventiary tenements," it is competent to the lord to prove the existence of customary estates bearing the same denomination in other manors. *Rowe v. Brenton*. 143

17. Payment within twenty years, of interest accruing before twenty years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to negative a plea of *solvit post diem*. *Saunders v. Meredith*. 116

18. Upon a question as to the right to minerals between the lord of the manor and his tenants, holding by a peculiar customary tenure, pervading a district which embraces several manors held for many centuries by the same lord *in capite*, and during that time governed and administered by persons acting under one commission issued by the lord at stated intervals, and extending to the whole district, acts of ownership exercised over the minerals in a customary tenement in another manor within the district, are admissible in evidence, although within time of legal memory the manors have been held by different lords, and under a subject. *Rowe v. Brenton*. 230

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### FALSE JUDGMENT.

1. After special verdict in customary court of manor of Trematon. *Skelton v. Starke.* page 249

### FALSE RETURN.

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1. Vested in duke of Cornwall, *ratione palatinatus.* 489

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1. Annexed to duchy of Cornwall by the second statutory grant. 482

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I. *Collateral undertaking.*

1. A promise to indemnify a co-surety need not be in writing. *Thomas v. Coske.* page 444

### FREIGHT.

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### GAME.

I. *Buying.*

1. The buying of game is prohibited in all cases by 58 Geo. 3, c. 75. *Helps v. Glenister.* 12
2. Therefore a contract for the sale of live pheasants, for the purpose of breeding, passes no interest to the purchaser, and cannot be enforced. *ibid.*

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## HIGHWAY.

1. An order for diverting and stopping up a highway, and substituting for it a new road, is bad, unless it appear that the public acquire as permanent a right in the latter as they had in the former. *Rex v. Winter.* 433
2. *Semble*, that this must appear on the face of the order. *ibid.*
3. *Semble*, that the order should shew a contract with the owner of the land over which the new road is to be made. *ibid.*
4. *Semble*, that upon the diversion of a highway it cannot be continued for foot passengers only. *ibid.*
5. An order for stopping up a road under the general turnpike act, 3 Geo. 4, c. 126, where the site of the old road is taken in exchange for that of the new, is valid, although no conveyance to the trustees be executed. *Allnutt v. Pott.* 439, n.

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1. A party effecting a life insurance is bound to disclose every material fact within his knowledge, whether he believes such fact to be material or not. *Lindenau v. Desborough*. 45

II. *Total loss.*

2. A ship insured in a valued policy for 2000*l.* was damaged by perils of the sea. She might have been repaired for 1450*l.*, but she was not worth repairing:—Held a total loss. *Allan v. Sugrue*. 9

III. *Policy.*

3. A deed in which several persons combine to effect a common purpose, requires only a common stamp. *Allen v. Morrison*. 70

4. Therefore a power of attorney whereby the several members of a mutual insurance club authorised the subscription of policies in their respective names, requires only one stamp; there being a community of purpose, though, (from each insurer being excluded from the policy upon his own ship,) not an entire community of interest. *ibid.*

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JUSTICES.

I. *Jurisdiction.*

1. Where money is advanced by the overseers to an infant, about to be apprenticed, for the purpose of providing her with clothes, the indenture is void unless approved of by two justices, under 56 *Geo. 3*, c. 139. *Rex v. Mattishall*. 386
2. When the Quarter Sessions confirm an order of removal, the validity of which turns upon a question of fact, that fact must be taken to have been found, although the evi-

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dence of the fact be stated in a case reserved, and this Court will not disturb such finding if there were any evidence from which the fact might be inferred. *Rex v. St. Andrew the Great.* page 374

3. A vessel, liable to forfeiture under 6 Geo. 4, c. 108, s. 3, was seized while entering the harbour of *A.*, but within the jurisdiction of the justices of *B.* A person liable to apprehension under s. 49 being found on board was arrested there, and carried to *A.* and convicted by two justices of that place under s. 74: Held, first, that the said person was, in the absence of evidence as to the time of his going on board, properly convicted, as having been on board on the high seas; and secondly, that the justices of *A.* had jurisdiction. *Rex v. Nunn.* 75

### II. Order for diversion of highway.

4. An order for diverting and stopping up a highway and substituting for it a new road, is bad, unless it appear that the public acquire as permanent a right in the latter as they had in the former. *Rex v. Winter.* 433
5. *Semble*, that this must appear on the face of the order. *ibid.*
6. *Semble*, that the order should show a contract with the owner of the land over which the new road is to be made. *ibid.*
7. *Semble*, that upon the diversion of a highway it cannot be continued for foot passengers only. *ibid.*
8. An order for stopping up a road under the General Turnpike Act, 3 Geo. 4, c. 126, where the site of the old road is taken in exchange for that of the new, is valid, although no conveyance to the trustees be executed. *Allnutt v. Pott.* 439, n.

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1. Where a master, without being applied to, volunteers to give an unfavourable character of a discarded servant, it is *prima facie* malicious, and not a privileged communication. *Pattison v. Jones.* 101

## LIEN.

### I. Particular.

1. *A. B.* and *C.*, part owners of a vessel, are partners in whale fishery adventures, in which the course has been for *C.*, as ship's husband, to sell the whalebone towards expenses, to deposit the blubber in a warehouse rented by *A. B.* and *C.* of *B.*, to divide the oil there produced, to put it into separate casks marked with their respective initials, and for *D.*, the warehouseman, to deliver out the oil upon the order of each partner respectively, unless notice be given by *C.* that such partner's share of the disbursements is unpaid, and in that case to detain the oil until payment. 29 tons having been set apart for *A.*, and placed in casks marked with his initials, and 20 tons having been delivered to his order, he becomes bankrupt, his share of the disbursements being unpaid. Afterwards notice of the nonpayment is given by *C.* to *B.* *B.* and *C.* have a lien as against the assignees of *A.* upon the remaining 9 tons for *A.*'s share of the disbursements not abandoned by the qualified appropriation of the 29 tons, or by the assent to the removal of the 20 tons. *Holderness v. Shackels.* 25

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1. Where a mandamus to admit a churchwarden recites that the party was duly nominated, elected, and chosen, "not duly elected" is a good return. *Rex v. P. Williams.* 402

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#### I. Character.

1. Where a master, not being applied to, volunteers an unfavourable character of a discarded servant, the act is *prima facie* malicious, and not a privileged communication. *Pattison v. Jones.* 101

### MINERALS.

See EVIDENCE, 16, 18.

## MORTGAGE.

### MISDIRECTION.

#### I. Cases where rules for new trials, &c. on the ground of misdirection, refused.

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|------------------------------|--------|
| 1. Cave v. Coleman.          | page 2 |
| 2. Best v. Saunders.         | 4      |
| 3. Allan v. Sugrue.          | 9      |
| 4. Helps v. Glennister.      | 12     |
| 5. Crowder v. Long.          | 17     |
| 6. Norton v. Pickering.      | 23     |
| 7. Lindenau v. Desborough.   | 45     |
| 8. Churchill v. Day.         | 71     |
| 9. Cole v. Hulme.            | 86     |
| 10. Clark v. Upton.          | 89     |
| 11. Carpenter v. Blandford.  | 93     |
| 12. Head v. Diggon.          | 97     |
| 13. Pattison v. Jones.       | 101    |
| 14. Woolley v. Scovell.      | 105    |
| 15. Doe d. Roby v. Maisey.   | 107    |
| 16. Doe d. Carr v. Billyard. | 111    |
| 17. Doe d. Lidgbird v. Best. | 114    |
| 18. Bird v. Jones.           | 121    |

#### II. Cases where rules discharged.

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|-----------------------|-----|
| 19. Edge v. Parker.   | 365 |
| 20. Morgan v. Curtis. | 389 |
| 21. Morley v. Hay.    | 396 |

#### III. Cases where rules made absolute.

|                         |         |
|-------------------------|---------|
| 22. Rowe v. Brenton.    | 280 (a) |
| 23. Morland v. Pellatt. | 411     |

### MONSTRAUNCE DE DROIT.

1. Proceedings by, to deraign a collateral warranty. *Rex v. Chiselden.* 498

## MORTGAGE.

#### I. Nature of this security.

1. Mortgage has no qualities at law which distinguish it from alienations, whether conditional or absolute, made for other purposes. 108, n.

#### II. Form of conveyance.

2. Mortgage for years, may, (where the mortgagor has a freehold to serve the use,) be created and executed in the mortgagee by way of bargain and sale, by reason of the apparent valuable consideration, without the introduction of bargain and sale. 110, n.

## PALACE COURT.

### III. *Rights of mortgagor.*

3. Interest of party seised in fee, mortgaging in fee or for years and reserving a right to hold until default of payment, not a chattel but a defeasible freehold in continuance of his former estate. *page 109, n.*
4. Assent of mortgagee to the possession of mortgagor, not necessarily inferred from the receipt of interest. *107, 108, n.*

### IV. *Rights of mortgagee.*

5. Mortgagee may recover in ejectment against mortgagor without a demand of possession. *Doe d. Roby v. Maiscy. 107*
6. Where lands are conveyed subject to a power of redemption, the mortgagee has the same rights at law as an absolute alienee. *108 n.*

## NEW TRIAL.

*See MISDIRECTION.*

## NISI PRIUS.

*See PREROGATIVE, 1.*

## NON-PROS.

*See COSTS, 1.*

## NOTICE.

*See SURETY, 2.*

## ORDER OF JUSTICES.

I. *For diverting highway.*

*See HIGHWAY, 1, 2, 3, 4.*

II. *For removal of pauper.*

*See APPEAL, 2.—JUSTICES, 2.*

## OVERSEER.

*See APPEAL, 2.—CHURCHWARDEN, 1.*  
*—ASSISTANT OVERSEER, 1, 2.*

## OYER.

I. *How much of the deed to be set out.*  
*See 86, n.*

## PALACE COURT.

1. Where plaintiff arrests defendant

## PLEADING. 545

without probable cause for a larger sum than he recovers, in an action commenced in the Palace Court and removed into this Court, this Court has no jurisdiction to allow defendant his costs under 43 *Geo. 3, c. 46, s. 3. Handley v. Levy. 37*

## PARISH CLERK.

*See EVIDENCE, 11.*

## PARISH REGISTER.

*See EVIDENCE, 11.*

## PAYMENT OF MONEY INTO COURT.

1. Where plaintiff declares for work done and upon an account stated, and money is paid into Court on the latter count only, he is not entitled to a verdict upon proof of work done, though no evidence be given of an account having been stated, and the money paid into Court greatly exceeds the sum due for work, and would be covered by a demand which the plaintiff has against the defendant by virtue of a covenant in a deed. *Churchill v. Day. 71*

## PEW.

### I. *Title to.*

1. A right to a pew can only exist by faculty or by prescription. *Morgan v. Curtis, Bart. 389*
2. Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. *ibid.*

## PLEADING.

### I. *Declaration.*

1. Declaration averred the consideration for the purchase of a horse to be "that the buyer should give a large price," to wit, 100 guineas. Proof, that the buyer was to give "100 guineas, and £10 more if the horse suited him:" Held, no variance. *Cave v. Coleman. 2*



## 546 PREROGATIVE.

### II. *Plea in abatement.*

See COSTS, 1.

### III. *Plea in bar.*

See BANKRUPT, 4.—PRACTICE, 1.

## POSSESSION.

### I. *How proved.*

See EJECTMENT, 1, 2.

### II. *Where executed in a bargainee.*

See MORTGAGE, 2.

### III. *Demand of, where necessary.*

See EJECTMENT, 3.

### IV. *Priority of.*

See 112, n.

## POWER OF ATTORNEY.

See INSURANCE, 4.

## PRACTICE.

And see APPEAL, 1.—ARREST, 1.—  
PAYMENT OF MONEY INTO COURT.

### I. *Proceedings against bail.*

1. After stay of proceedings in an action on the bail bond, there may be a plea of bankruptcy in the original action where the bail bond is not ordered to stand as a security. *Sainsbury v. Gandon.* page 16

### II. *Addressing the jury.*

2. Where in an action between subjects the crown interfered *pro interesse suo*, and undertook the defence of the cause, and witnesses were called on both sides, the plaintiff was allowed the general reply. *Rowe v. Brenton.* 305

### III. *Trial at bar.*

3. In a trial at bar each of the presiding judges makes such observations to the jury upon the whole case, by way of direction, as he considers to be requisite. *Rowe v. Brenton.* 364

## PREROGATIVE.

### I. *Of the king.*

1. The crown may forbid the issuing of a writ of *nisi prius* in any action

## RECITAL.

in which the king has an interest.

*Rowe v. Brenton.* page 133

2. A suggestion *ore tenus* by the attorney-general that the crown is interested in a suit depending between subject and subject, is a sufficient ground for ordering a trial at bar. *ibid.*
3. Where, in an action pending between subjects, the crown, having an interest in the subject-matter, intervened and undertook the defence of the cause, and witnesses were called on both sides, the plaintiff was allowed the general reply. *Rowe v. Brenton.* 305

### II. *Of the duke of Cornwall.*

4. Capacity of being lord *in capite.* 482
5. Right of primer seisin. *ibid.*
6. Power of giving liberty to return burgesses to parliament. 255, n.
7. Right to fines on alienation. 489

## PRESCRIPTION.

See PEW, 1.

## PRESUMPTION.

See EVIDENCE, 15.—PEW, 1.

## PRIMAGE.

See SHIP, 1, 2, 3.

## PRIMER SEISIN.

### I. *Prerogative of, in whom vested.*

1. Of lands in Cornwall, in the duke. 489

## PRIVILEGED COMMUNICATION.

See MASTER AND SERVANT, I.

## RECEIVER'S ACCOUNTS.

See EVIDENCE, II.

## RECITAL.

- I. *Operation of, in narrowing the construction of an instrument.*

See BARON AND FEME, 3.

## SETTLEMENT.

### REMAINDER.

#### I. *How protected.*

1. Right of remainder man to sue for an injury to his expectant interest. *page 107, n.*

### REMOVAL OF CAUSES.

*See* PALACE COURT, 1.

### RENEWAL.

*See* CONVENTIONARIES, 1.

### REQUEST.

*See* 130 (a), 131 (d).

### RETURN.

*See* ACTION, 1.—MANDAMUS, 1.

### SEA SHORE.

#### I. *In whom vested.*

1. Soil between high and low water mark *primâ facie* in the Crown. 329
2. In the river Tamar and its tributary streams, it is in the Duke of Cornwall. *ibid.*

### SECURITY.

*See* COSTS, II.—PRACTICE, 1.

### SEISIN.

#### I. *How proved.*

*See* EJECTMENT, 1, 2.

### SEPARATION.

*See* BARON AND FEME, 3.

### SERVANT.

*See* MASTER AND SERVANT.

## SETTLEMENT.

#### I. *What places extra-parochial.*

1. An act for draining fen-lands vests 5000 acres in trustees as a recompense for the undertakers, and directs that inhabitants upon any part of the 5000 acres, unable to main-

## SHERIFF. 547

tain themselves, shall be maintained by the trustees and not by the parishes. The 5000 acres become an incorporated district; but they are not rendered extra-parochial, and hiring and service thereon gains a settlement where the service is performed, either in the particular parish or in the district generally. *Rex v. Croyland.* *page 422*

#### II. *By payment of rates.*

2. Payment of watch-rate in London does not confer a settlement. *Rex v. St. Ann's.* 383

#### III. *By serving an office.*

3. The office of assistant-overseer under 59 *Geo.* 3, c. 12, is a public annual officer within 3 & 4 *W. & M.* c. 11, s. 6. *Rex v. Lew.* 369

#### IV. *By hiring and service.*

4. "Let him stop what time he will, I will give him satisfaction, if not in money in clothes." The sessions are at liberty to infer that this was not a general hiring. *Rex v. Rosliston.* 420
5. *A.*, an innkeeper, said to *B.*, "I have a lad coming in a fortnight, but you may stay till he comes." *B.* continued in the service three years without anything further passing. The Court of Quarter Sessions is at liberty to infer a general hiring. *Rex v. St. Martin.* 377

## SHERIFF.

#### I. *How appointed.*

1. Mode of electing sheriffs in Cornwall under charter of 6 *Johan.* 493

#### II. *Remedy of, against a collusive execution creditor.*

2. A bailiff having seized goods under a *fi. fa.* against *B.*, is authorised by *A.*, the creditor, to quit possession, *B.* consenting that he may return and sell. The bailiff quits possession, and afterwards returns

## 548 SMUGGLING.

and sells, and the sheriff pays the proceeds to *A.* Before the sale, *C.* issues a *fi. fa.* against *B.*, to which the sheriff returns *nulla bona.* *C.* recovers the value of the goods from the sheriff in an action for a false return. *A.* is liable to the sheriff for the damages and costs recovered by *C.*, unless he can show that the sheriff was conusant of the misconduct, or that the action is brought for the benefit of the bailiff. *Crowder v. Long, Gent.* one, &c. page 17

### SHIP.

#### I. *Primage.*

1. *Primage* belongs to the master and nothing but an express agreement can divest his right to recover it from the freighter. *Best v. Saunders.* 4
2. An agreement by the master to receive from the owner a fixed sum "in full for all cabin and other allowances," does not divest the master's right to *primage.* *ibid.*
3. By bill of lading freight was to be paid "as per charterparty with *primage* and average accustomed:" Held, that the reference to the charterparty applied to the freight only, and that in an action for the *primage* the charterparty need not be produced. *ibid.*

## SMUGGLING.

1. A vessel, liable to forfeiture under 6 *Geo.* 4, c. 108, s. 3, was seized while entering the harbour of *A.*, but within the jurisdiction of the justices of *B.* A person liable to apprehension under s. 49 being found on board was arrested there, and carried to *A.* and convicted by two justices of that place under s. 74: Held, first, that the said person was, in the absence of evidence as to the time of his going on board, properly convicted, as having been on board on the high

## STATUTES.

seas; and, secondly, that the justices of *A.* had jurisdiction. *Rex v. Nunn.* page 75

### SOCAGE.

1. In frank tenure. 230 (a)
2. In ancient tenure. *ibid.*
3. Of base tenure. *ibid.*

### STAMP.

#### I. *Deeds.*

1. A deed, by which several persons combine for a common purpose, requires only the ordinary deed stamp. *Allen v. Monins.* 70

#### II. *Grants.*

2. If a salary be annexed to the office of assistant overseer, the appointment requires a stamp under 55 *Geo.* 4, c. 184, and service of the office for a year under an unstamped appointment confers no settlement. *Rex v. Lew.* 369

#### III. *Unstamped instruments, where receivable.*

See EVIDENCE.

## STATUTES.

#### I. *Non-existing.*

1. A statutory grant may be presumed even as against the Crown. *Lopez v. Andrews.* 325 (a)
2. Or against the Duke of Cornwall. *ibid.*

#### II. *Points upon particular statutes.*

3. 4 *Edw.* 1, stat. 1. (*Extenta manerii.*) 164, 167
4. 13 *Edw.* 1, stat. 1, c. 31. (*Bill of exceptions.*) 266
5. 18 *Edw.* 1, stat. 1. (*Quia emptores.*) 353, 507
6. 17 *Edw.* 2, stat. 1. (*Prærogativa Regis.*) 246, 353
7. 11 *Edw.* 3, 17 March, 1337. (*Creation of Duchy of Cornwall.*) 474

## STOPPAGE IN TRANSITU.

8. 11 Edw. 3, 18 March, 1337. (Annexation of franchises to Duchy of Cornwall. *page* 482)
9. 17 Edw. 4, c. 1. (Duchy of Cornwall.) 256
10. 2 Hen. 7, c. 4. (Duchy of Cornwall.) 256
11. 1 Hen. 8, c. 9. (Duchy of Cornwall.) 256
12. 27 Hen. 8, c. 10. (Uses.) 110, n.
13. 2 Jac. 1, c. 27, s. 4. (Game) 13
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15. 21 Jac. 1, c. 16. (Limitation of actions.) 118
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18. 3 & 4 W. & M. c. 11, s. 6. (Poor.) 369
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26. 43 Geo. 3, c. 46. (Costs.) 37
27. 55 Geo. 3, c. 184. (Stamps.) 369
28. 56 Geo. 3, c. 139. (Apprentice.) 386
29. 58 Geo. 3, c. 75. (Game.) 12
30. 59 Geo. 3, c. 12. (Assistant Overseer.) 369
31. 3 Geo. 4, c. 78. (Duchy of Cornwall.) 171
32. 3 Geo. 4, c. 126. (Turnpikes.) 429, n.
33. 6 Geo. 4, c. 16, s. 44. (Bankrupt.) 36
34. 6 Geo. 4, c. 16, s. 108. (Bankrupt.) 411
35. 6 Geo. 4, c. 50, s. 34. (Special jury.) 128
36. 6 Geo. 4, c. 108, s. 3. (Customs.) 49, 74, 75

## STOPPAGE IN TRANSITU.

1. Upon a sale of goods the transitus VOL. III.

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continues until the goods have reached their ultimate destination under the contract of sale, or the vendee has given a new direction to the property. *Morley v. Hay.* *page* 396

2. The right of a vendor to stop in transitu is paramount to the general lien of the carrier against the purchaser. *Morley v. Hay. ibid.*

## SUGGESTION.

I. *By Attorney-General, ore tenus.*

1. Where a sufficient ground for awarding a trial at bar. *Rowe v. Brenton.* 133

## SURETY.

### I. *How charged.*

1. Upon a bond conditioned that a clerk shall account for all moneys received on account of his employers, and shall act with fidelity and punctuality in the matters entrusted to him, entries made by the clerk in the books kept by him in the course of his employment, whereby he charges himself with the receipt of moneys on account of his employers, are after his death *prima facie* evidence against his sureties, the obligors, of the receipt of such moneys. *Whitmarsh v. Genge.* 42
2. But it is open to the latter to show that the entries are incorrect; though, by so doing, they will render themselves liable as upon a breach of the second branch of the condition. *ibid.*

### II. *How discharged.*

3. Upon a bond conditioned for a collecting clerk's truly accounting for and paying over moneys by him received from time to time and at all times during his continuance in the service, the obligor cannot discharge himself from further liability by giving notice on a particular day that from thenceforward he will not remain surety. *Calvert v. Gordon.* 125

## 550 TRIAL AT BAR.

4. *Semble*, that such obligor must remain liable at all events during the whole period of the service.

page 125

5. A surety may protect himself by stipulating in the instrument of guarantee that he shall be at liberty to determine his liability at the expiration of a specified time after notice. *ibid.*

### III. Remedy against co-sureties.

6. A promise to indemnify a co-surety need not be in writing. *Thomas v. Cooke.* 444

## SURRENDER.

*And see* ESTATES, 2.

### I. What shall pass.

1. The surrenderee of a customary estate takes the whole interest of the surrenderor, without regard to acts or incumbrances of admitting lord. *Rowe v. Brenton.* 280 (a)

### II. How proved.

*See* EVIDENCE, 3.

## TENANT.

*See* ACTION ON THE CASE, 2—ANCIENT DEMESNE, 1.—ESTATES.—SOCAGE.

## TENURE.

*And see* ESTATES.—SOCAGE.

### I. In capite.

1. Of the Crown. 234
2. Of the Dukedom of Cornwall. 489

## TIME.

*And see* SURETY, 5.

### I. Materiality of.

1. Where of the essence of the contract. 95, 96, n.

## TRIAL AT BAR.

*See* PREROGATIVE, 2, 3.

## VENDOR AND PURCHASER.

### TURNPIKE ROADS.

*See* JUSTICES, 8.

## USES.

### I. What executed.

*See* MORTGAGE, 6.

## VARIANCE.

### I. In matter of allegation.

1. Declaration averring the consideration for the purchase of a horse to be "that the buyer should give a larger price, to wit, 100 guineas." • Proof that the buyer was to give "100 guineas, and £10 more if the horse suited him." Held, no variance. *Cave v. Coleman.* page 2

## VENDOR AND PURCHASER.

*And see* STOPPAGE IN TRANSITU.

### I. Contract, when perfect.

1. Time how far of the essence of the contract. 95, 96, n.
2. Where waived. 95, n.
3. From what period contract binding where treaty is by letter. 99, 100, n.
4. *A.* and *B.* being together, *B.* offers goods to *A.* at a certain price, and gives *A.* three days to make up his mind. Before the three days expire, *B.* offers the goods to *C.* *A.* cannot declare against *B.* as upon an absolute bargain, and *semble*, that *B.* had a right to retract. *Head v. Diggon.* 97

### II. Where rescinded.

5. *A.* having agreed to purchase an estate, and paid a deposit, *B.*, the seller, is unable to make a good title by the stipulated day. *A.* afterwards, upon negotiating a compromise with his creditors, states his apprehension that he may be compelled by *B.* to complete the purchase, and applies to *B.* to cancel the contract and return the deposit. *B.* refuses to do either;

## WARRANTY.

## YEAR DAY AND WASTE. 551

but says that he will never take any steps against *A.* to enforce the contract. Upon this footing the composition proceeds, *C.* engaging to secure 7*s.* in the pound. It would be a fraud upon the creditors and upon *C.* if *B.* were to enforce the contract, and therefore *A.* cannot maintain an action against *B.* for the deposit. *Clark v. Upton.* page 89

### III. Forfeiture of deposit.

6. Upon a sale of an interest in a house, the fixtures to be taken at a valuation, and deposit forfeited if purchase, through default of purchaser, be not completed on a certain day; the vendor's agent is informed on that day that the purchase will not be completed until the following day, and no objection is made; the vendor cannot on the second day insist upon the forfeiture. *Carpenter v. Blandford.* 93

## VERDICT.

### I. Special.

1. On issue upon the right of the widow of a conventional tenant to devise to any other than the right heir of the husband. *Skelton v. Starke.* 465

## VILLENAGE.

See ESTATES, 3.—And see ante, 524.

## WARRANTY.

### I. What shall amount to.

1. A verbal representation by the seller to the buyer in the course of

dealing, "that he may depend upon it the horse is perfectly quiet and free from vice," is a warranty. *Cave v. Coleman.* page 2

### II. How described.

2. Declaration averring the consideration for the purchase of a horse to be "that the buyer should give a large price, to wit, 100 guineas." Proof that the buyer was to give "100 guineas, and £10 more if the horse suited him:" Held, no variance. *Cave v. Coleman.* *ibid.*

### III. Collateral warranty.

See KING, 1.

## WATCH RATE.

See SETTLEMENT, 2.

## WIFE.

See BARON AND FEME.

## WILL, ESTATE AT.

See ESTATES, II.

## WORK AND LABOUR.

See ACTION, 2.

## YEAR DAY AND WASTE.

### I. Who shall have.

1. Where the estate passes by surrender by the rod, although not held at the will of the lord, the tenure is base, and the lord, and not the king, shall have the year day and waste. 337 (d)

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